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President's Page

AS these lines are written, word has just gone out to the world of the serious illness of President Eisenhower. That tragic news dwarfs into utter insignificance the words with which I had intended to fill this page.

Regardless of party affiliations all Americans join in the sincere hope that the President will speedily be returned to the vigor of health.

I leave to others and to a more timely and appropriate place all speculation and comment on the political future. Discussion of such matters has no place here. We can, however, appropriately join with leaders of thought in all fields and in all parts of the free world in devout and fervent prayers for the recovery of one of the great and beloved figures of today.

Until the world has succeeded in its quest for universal peace, it can ill afford to lose a degree of leadership so richly endowed with the old-fashioned qualities of courage, simplicity, moderation and integrity.

I know that all our members join in this expression of American sentiment.

* * * * *

Plans for the mid-winter meeting are now maturing and it presently seems likely that the meeting will be held in Arizona during the early part of February.

Our new offices in Milwaukee are nearing completion and will be occupied soon. Our Executive Secretary is functioning with all the efficiency that was expected and excellent progress reports are being received from our Committees.

Manifestly, our Journal is in good hands but I want again to remind our members that it is to you that we look for material and without your continuing contributions of interesting and worthwhile articles the Editors face a hopeless task. Let me urge again that you send in those contributions.

LESTER P. DODD,
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CURRENT DECISIONS

In each issue of the Journal there will be published two or three pages of Current Decisions. These will be brief digests of recent cases of particular interest to insurance lawyers. All members of the Association are urged to participate in this important feature of our Journal.

Reports of Current Decisions should be sent to your State Editor. Full credit will be given to all contributors.

NEGLIGENCE— FALL IN STORE

Where fresh, crisp, white popcorn was seen by a customer on the floor of defendant's store near the grocery counter a few minutes before the plaintiff stepped on the popcorn and fell, and there was no proof that any of the defendant's employees had actual knowledge of the presence of the popcorn on the floor, the plaintiff could not recover. The proof was insufficient to establish constructive notice. *H. L. Green Company v. Bowen,* (4th Cir.) 223 F. 2d 523, decided June 13, 1955.

* * *

ACCIDENT— ST. PAUL V. RUTLAND

The policy provided $5,000 property damage coverage for "each accident". Insured's truck collided with a freight train and damaged sixteen cars and their contents and also damaged the roadbed of the railroad company. The sixteen cars belonged to fourteen separate owners, total damage $41,371.31. The contents belonged to numerous shippers, total damage $7,638.91. The roadbed damage was $9,000.

The original decision of the Fifth Circuit Court of Appeals, handed down December 15, 1954, (one judge dissenting) held that the words, "each accident" should be construed from the point of view of the persons whose property was injured. The court said, "When separate property of each claimant is damaged, an accident occurs to the property of each owner".

That opinion was reported in the advance sheets, 217 F. 2d 585, but before it became effective it was withdrawn and the appeal was placed on the rehearing docket.

Upon re-argument to a different panel of judges, the court (one judge dissenting) reached the opposite conclusion. In its decision handed down August 24, 1955, the majority said, "Considering only the policy involved here without reference to previous judicial interpretations, we think it clear that the word "accident" as used in the disputed phrase was intended to be construed from the point of view of the cause rather than the effect. * * * The single, sudden and unintentional collision involved here was one accident, and the insurer's liability for all property damage resulting therein is $5,000."

A motion for rehearing en banc has been filed by the appellee. The case is *St. Paul Mercury Indemnity Company v. Rutland,* No. 15184 on the dockets of the United States Court of Appeals for the Fifth Circuit.

* * *

FIDELITY BONDS— WHAT IS DISHONESTY?

The case of *Mortgage Corporation of New Jersey v. Aetna Casualty & Surety Co.,* 115 A. 2d 43, decided by the Supreme Court of New Jersey, June 20, 1955, deals with a loss resulting from ninety-two false certifications made by a bonded employee, concerning the current status of building construction, on the basis of which the insured lost over $80,000 advanced under a construction mortgage. These certifications were made without any personal inspections but in reliance upon information furnished by a representative of the borrower. The bonded employee believed he was making true certifications and there was no evidence that he derived any financial or other benefit by furnishing certifications which proved false. Nevertheless, the court, in a four to three decision, affirmed the directed verdict for the plaintiff granted by the trial court after the jury had found for the defendant insurer.

The court ruled that where facts are uncontroverted and reasonably permit of but a single conclusion, the construction and effect of the bond is a matter of law to be decided by the court and not a question of

fact for the jury. The majority opinion says, "Under the admitted facts (the employee) palpably was faithless to his trust and deceived his employer; it matters not that his conscious deceptions may not have been accompanied by intent to cause actual monetary loss to his employer and may have been induced by motives of personal comfort or convenience rather than personal profit or gain for, in any event, his conduct was morally as well as legally wrongful." (Contributed by Henry W. Nichols, New York, N. Y.)

* * *

INSURANCY POLICY— DISCOVERY OF LIMITS

In *Jeppesen v. Swanson,* 68 N.W. 2d 649 (Minn. 1955) the Supreme Court of Minnesota has held that a plaintiff in a personal injury action may not discover defendant's insurance policy or policy limits. The decision involved an interpretation of Minnesota Rules of Civil Procedure 26.02 and 34 which are identical in all material respects to Federal Rules 26 (b) and 34.

Prior to trial, plaintiff's attorney made a motion pursuant to Rule 34 requesting the production of defendant's policy of liability insurance. In a supporting affidavit, plaintiff's attorney stated that he wished to know the policy limits in order to evaluate properly a figure for either settlement or trial which would dispose of the matter. The lower court granted the motion and defendant's attorneys secured a writ of prohibition restraining enforcement of the lower court's order. The supreme court made the writ absolute holding that insurance may not be the subject matter of discovery for the purposes stated.

The supreme court adopted the reasoning of *McClure v. Boeger,* 105 F. Supp. 612 (E. D. Pa. 1952), and relied upon the rationale of *Hickman v. Taylor,* 329 U.S. 495 (1947), and the notes of the U. S. Supreme Court Advisory Committee concerning the 1948 amendment to Fed. Rule 26 (b), reprinted in 2 Barron and Holtzoff, Federal Practice and Procedure 646, pp. 294-95.

It declined to follow *Brackett v. Woddall Food Products, Inc.,* 12 F. R. D. 4 (E. D. Tenn. 1951), *Maddox v. Grauman,* 265 S.W. 2d 934 (Ky. 1954), and certain suggestions in *Superior Ins. Co. v. Superior Court,* 37 Cal.. 2d 749, 235 p. 2d 833 (1951).

The court said that while discovery is not limited to facts which may be admissible in evidence, the purpose of discovery is not served by forcing a party to give information which can have no possible bearing on the determination of the action on its merits. (In Minnesota, it is error to inform the jury of the existence of insurance of a party.) The situation was likened to an attempt to discover the nature, location and extent of defendant's other assets which might be available to satisfy some possible future judgment in the case. (Contributed by Meagher, Geer, Markham & Anderson, Minneapolis, Minnesota.)

* * *

INDEMNIFYING AGREEMENT— SUBROGATION

Nelson, a tree-trimming contractor, undertook a contract for Ohio Public Service Co. and agreed "to indemnify and save harmless (Ohio Public Service Co.) from any and all loss, cost, damage, or expense to persons or property, including the injury or death suffered by persons employed by (Nelson) or members of the public, growing out of or in any way connected with the performance of the work". Snyder, an employee of Nelson, was killed when he came in contact with a high voltage power line maintained by Ohio Public Service Co. St Paul Mercury Indemnity Co., insurer of Ohio Public Service Co., settled the death claim against its insured, took an assignment of its insured's rights against Nelson and sued him on the above indemnifying agreement. The Court of Appeals for Cuyahoga County, Ohio, in a decision reported July 4, 1955, held that Nelson had to pay, even though Snyder's death was caused by the alleged negligence of Ohio Public Service Co. in the maintenance of the wires. *St. Paul Mercury Indemnity Co. v. Kopp,* 70 Ohio Law Abstract 259. See also *Indemnity Insurance Co. of North America v. Koontz-Wagner Electric Co., Inc.,* 131 F. Supp. 432.

* * *

DAMAGES— FUTURE CONSEQUENCES

The Fifth Circuit continues to adhere to the rule that medical testimony as to future consequences of an injury must be limited to reasonable probabilities. The court says, "The testimony must establish a probability, not a mere possibility of causal connection." *Fort Worth & Denver Ry. Co., v. Janski,* 223 F. 2d 704, decided June 28, 1955.

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Higgs, Fletcher and Mack
726 Bank of America Building

HOLESAPPLE, A. Y.—Tucson, Arizona
Warnell, Robertson, Holesapple & Spaid
410 Valley National Building

HOLTORF, HANS J., JR.—Gering, Nebraska
1728 Broadway

HUTCHESON, J. STERLING—San Diego 1, Calif.
Gray, Cary, Ames & Frye
1410 Bank of America Building

KANTROW, BYRON R.—Baton Rouge 2, La.
Kantrow, Spaht and West
207-214 Roumain Building

KENLINE, ROBERT—Dubuque, Iowa
Kenline, Roedell, Hoffman & Reynolds
418 Bank & Insurance Building

KITTRELL, ROBERT G., JR.—Henderson, N. C.
Perry and Kittrell
Law Buliding

MACK H. PITTS—San Diego 1, Calif.
Higgs, Fletcher and Mack
726 Bank of America Building

MARSHALL, FRANCIS E.—Philadelphia 9, Pa.
Davis, Marshall & Crumlish
123 South Broad Street

MILLER, ARNO J.—Portage, Wis.
O'Keefe & Miller
Eulberg Building

MOORE, REX H.—Phoenix, Arizona
Jennings, Strouss, Salmon & Trask
Title and Trust Building

MORGAN, WILLIS D.—Utica 2, N. Y.
Kernan and Kernan
First National Bank Building

MURANE, EDWARD E.—Casper, Wyoming
Murane and Bostwick
510 Wyoming National Bank Building

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McInnis, Hamilton & Fitzgerald
530 Broadway

PACKARD, ROBERT C.—Los Angeles 14, Calif.
Reed and Kirtland
621 South Spring Street

PECKINPAUGH, CHARLES W., JR.—Toledo 4, Ohio
Shumaker, Loop and Kendrick
240 Huron Street

SANDERS, WILSON—Orlando, Florida
Sanders, McEwan and Berson
108 East Central Avenue

SMITH, ERIC P.—Rochester 14, N. Y.
Brown, Zurett & Sullivan
1020 Reynolds Arcade

STEELE, WALTER A.—Denver 2, Colo.
White and Steele
550 Equitable Building

TAYLOR, ROBERT E.—Charlottesville, Va.
Taylor and Deets
Court House

TRASK, OZELL M.—Phoenix, Arizona
Jennings, Strouss, Salmon & Trask
Title and Trust Building

TWEEDY, CHARLES E., JR.—Jasper, Ala.
Tweedy & Beech
First National Bank Building

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Cooke and Velpmen
619 South New Hampshire Avenue

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Government Employees Insurance Co.
Government Employees Insurance Building

WHITEHEAD, GEORGE I., JR.—New York 38, N. Y.
Director of Claims,
United States Aviation Underwriters
80 John Street

WILLCOX, HUGH L.—Florence, S. C.
Willcox, Hardee, Houck & Palmer
248 West Evans Street

WILLIAMS, GORDON E.—Columbus 15, Ohio
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NEW YORK MID-WINTER LUNCHEON

The fourteenth annual mid-winter cocktail party and luncheon for all members of the Association and their families and guests will take place on Saturday, January 28, 1956, in New York City. Notices will be sent out late this year to members residing in Connecticut, New Jersey, New York and Pennsylvania but the committee on arrangements emphasizes that attendance is by no means limited to them. Last year 132 members attended from a number of states.

According to President Dodd, the mid-winter meeting of the Executive Committee will not conflict with the New York affair, so it is anticipated that several of the officers and Executive Committee members will be present.

The committee on arrangements consists of Price H. Topping, chairman, Milton L. Baier and Ernest W. Fields. Further details will be announced in the January issue of the Journal.

Report of Accident and Health Committee—1955

C. C. Fraizer, *Chairman*
Lincoln, Nebraska

THE subject having most dramatic interest has been the conflict of jurisdiction as between the Federal Trade Commission and the National Association of Insurance Commissioners. The issue has been developed because the FTC filed (up to now 28) complaints against various health and accident insurance companies, alleging misleading advertising. Several of the companies have vigorously questioned FTC jurisdiction, claiming that the states retain exclusive jurisdiction in this as well as other insurance regulatory matters. At this writing, the conflict is at a climactic point and it is quite likely that eventually the U. S. Supreme Court will be asked to decide this jurisdictionional question. However, if the industry as a whole, including all of the companies complained against, should enter into a Trade Practice Conference with FTC, with the possibility that the National Association of Insurance Commissioners might be the third party to such a conference, it is remotely possible that a trip to the U. S. Supreme Court on this subject might be avoided.

However, the foregoing subject, while of general interest to all insurance lawyers, is not of too much direct interest to insurance lawyers who do not particularly contact insurance regulation. There has been a development during the past year of interest to all insurance lawyers even remotely connected with health and accident insurance and that is on the state legislative front. Bills have been introduced in a large number of legislatures, particularly in the South, endeavoring to curtail the right of health and accident insurance companies to cancel policies or refuse to renew policies. A complete discussion of this subject would unduly enlarge this report. Furthermore, the issue thus presented is one of philosophy as much as law. Should health and accident insurance companies be permitted to write low-premium coverage for millions of people, thus giving them a considerable degree of protection even though not perfect protection; or should low-premium health and accident insurance be abandoned and health and accident insurance companies be so completely "fenced in" with restrictions that premiums would necessarily be increased to a point available only to the higher income group but beyond the premium pocketbook of the public as a whole?

At this writing the legislative record is not complete, and interested insurance lawyers will wish to closely watch such legislation not only during the balance of the present legislative sessions, but in future years.

Court decisions relating to health and accident insurance during the past year have not indicated any particular trend, and the perpetual struggle of the courts to reach suitable decisions in these difficult cases continues.

Respectfully submitted,

C. C. FRAIZER, *Chairman*
J. H. GONGWER, *Vice-Chairman*
J. A. GOOCH, *Ex-Officio*
HAROLD G. BAKER
STANLEY M. BURNS
GERVAIS W. FAIS
LESLIE P. HEMRY
JOHN A. HENRY
WALKER LIDDON
THOMAS J. LONG
CLARENCE E. MARTIN, JR.
IVAN ROBINETTE
ROBERT W. SHAKLEFORD

Report of Automobile Insurance Law Committee—1955

PRIMARY AND EXCESS COVERAGE IN VIEW OF THE "OTHER INSURANCE" PROVISION

A. FRANK O'KELLEY, *Chairman*
Tallahassee, Florida

AT a meeting of the committee at the Greenbrier a decision was made to study the question of primary and excess coverage in view of the "other insurance" provision in automobile liability insurance policies. During the study it was learned that splendid articles on the subject had been written in 1948 and 1949 by Fletcher B. Coleman, a member and a former chairman of this committee, and Victor C. Gorton, a former chairman of this committee, and we commend these to you.[1] Faced with a decision as to whether to proceed with the study of a subject which had been so carefully treated, it was decided, inasmuch as the policy provisions had not long been in effect,[2] and as there had thus been only a limited opportunity for their construction by the courts, to review the more recent decisions. In general, we may report that in the absence of unusual factual situations and allowing for the "fickleness" of the courts, the conclusions reached from the earlier cases have been sustained by the later decisions.

There are a number of situations where there are two or more policies covering the same risk in which the question arises as to which coverage is primary and which is excess, or whether they are applicable prorata, in view of the "other insurance" provisions in the policies. A common occasion involves the omnibus coverage of the policy of the owner of the vehicle involved in the accident and the provision in the policy covering an automobile of the driver which extends coverage to his operation of another vehicle.[3] Frequently there is involved the omnibus coverage of the owner's policy and a hired car[4] or non-ownership[5] policy.

Other situations include: (1) an automobile liability insurance policy as related to a garage liability policy,[6] a conditional vendee's automobile policy,[7] an ownership and use of premises policy and an auto storage garage and service station policy,[8] a second automobile policy which was procured by the owner after receiving notice that the first would be canceled,[9] a policy covering premises,[10] a comprehensive liability policy,[11] a lessee's policy covering

[1]Interpretation of Drive Other Car and Other Insurance Provisions in Automobile Policy, XV *Insurance Counsel Journal 31*, and A Further Study of the Effect of the "Other Insurance" Provision Upon Automobile Liability Insurance, XVI *Insurance Counsel Journal* 190.

[2]Coverage v. Use of Other Automobiles of the Standard Automobile Combination Policies, P. L. Thornbury, XVII *Insurance Counsel Journal* 383.

[3]Zurich General Accident & Liability Ins. Co. v. Clamor, 124 F. 2d 717; Travelers Indemnity Co. v. State Automobile Ins. Co., et al, 67 Ohio App. 457, 37 N. E. 2d 198; American Automobile Ins. Co. v. Penn Mutual Indemnity Co., 161 F. 2d 62; Oregon Automobile Ins. Co. v. United States Fidelity & Guaranty Co., et al, 195 F. 2d 958; Speier, et ux v. Ayling, 158 Pa. Super. 404, 45 A. 2d 385; Farm Bureau Mutual Automobile Ins. Co. v. Preferred Accident Ins. Co., 78 F. Supp. 561; Aetna Casualty & Surety Co. v. DeMaison, et al., 114 F. Supp. 106; Continental Casualty Co., et al., v. Weekes, et al., (Fla.) 74 So. 2d 367; Celina Mutual Casualty Co. v. Citizens Casualty Co., 194 Md. 236, 71 A. 2d 20 (Driver, who owned no car, covered by named operator's policy required by statute for restoration driver's license).

[4]Michigan Alkali Co. v. Bankers Indemnity Ins. Co., et al, 103 F. 2d 345; Grasberger v. Liebert & Obert, Inc., 335 Pa. 491, 6A. 2d 925, 122 A.L.R. 1201; Commercial Casualty Ins. Co. v. Hartford Accident & Indemnity Co., 190 Minn. 528, 252 N. W. 434 (Reh. den. 253 N. W. 888); New Amsterdam Casualty Co. v. Hartford Accident & Indemnity Co., 108 F. 2d 653; Maryland Casualty Co. v. Bankers Indemnity Ins. Co., 51 Ohio App. 323, 200 N. E. 849.

[5]American Surety Co. of New York v. American Indemnity Co., et al, 8 N. J. Super. 343, 72 A. 2d 798; Continental Casualty Co. v. Curtis Publishing Co., 94 F. 2d 710.

[6]Kenner v. Century Indemnity Co., et al., 320 Mass, 6, 67 N. E. 2d 769, 165 A.L.R. 1463.

[7]Traders & General Ins. Co. v. Pacific Employers Ins. Co., et al., (Cal. App.) 278 P. 2d 493.

[8]Commercial Standard Ins. Co. v. American Employers Ins. Co., 209 F. 2d 60.

[9]Vrabel v. Scholler, et al., 369 Pa. 235, 85 A. 2d 858, 372 Pa. 578, 94 A. 2d 748.

[10]Trinity Universal Insurance Co. v. General Aciident Fire & Life Assurance Corp., Ltd., et al., 138 Ohio St. 488, 35 N. E. 2d 836.

[11]Employers Liability Assurance Corp. v. Pacific Employers Ins. Co., et al., 102 Cal. App. 2d 188, 227 P. 2d 53; Maryland Casualty Co. v. Employers Mutual Liability Ins. Co., 112 F. Supp. 272.

automobiles owned or operated by lessee,[13] and two general liability policies;[14] and (2) a public liability policy as related to another public liability policy.[15]

Prorata v. Prorata

Where there is a provision that the omnibus or other coverage shall apply prorata with other insurance, and the insurance afforded by the driver's policy or another applicable policy contains a prorata provision, the authorities both before and after 1949 seem to be in accord that the two policies should apply prorata.[16]

Escape v. Excess

A provision that the insurance afforded by the policy should be void or inapplicable in the event there is other valid and collectible insurance available to the insured covering the same risk has been referred to as an "escape" provision, and for convenience we shall adopt such term. By 1949, in a majority of the cases involving an escape provision in connection with the omnibus or other coverage, as related to the extended coverage in the driver's policy, or under a non-ownership or hired car policy, with an excess provision, the courts had held that the latter coverage was excess only and the former was responsible primarily.[17] In some of the cases the courts held that the language used with respect to the extended or other coverage was more specific than the language applicable to the omnibus coverage and that the specific language is controlling over the general.[18] In other cases the reasons assigned were that such coverage afforded excess insurance only and therefore was not other "valid and collectible" insurance; the scope of coverage of the policies was not the same; and such policies did not apply until the limits of insurance afforded by the omnibus coverage had been exceeded.[19]

A different result was reached in *New Amsterdam Casualty Co. v. Hartford Accident & Indemnity Co.* (United States Court of Appeals, Sixth Circuit, 1940),[20] in which the court decided that the hired car policy, which was the one first issued, should be applicable and that the omnibus coverage of the other policy was rendered void. In another case, *American Automobile Insurance Co. v. Penn Mutual Indemnity Co.* (United States Court of Appeals, Third Circuit, 1946),[21] where the driver had a "required" financial responsibility

[13]McFarland, et al., v. Chicago Express, Inc., 200 F. 2d 5.

[14]Central Surety & Ins. Corp. v. New Amsterdam Casualty Co., et al., 216 S.W. 2d 527 (Reversed on ground of exclusion in liability policies, 359 Mo. 430, 222 S. W. 2d 76).

[15]Consolidated Shippers, Inc. v. Pacific Employers Ins. Co., et al., 45 Cal. App. 2d 288, 114 P. 2d 34; Traders & General Ins. Co. v. Hicks Rubber Co., et al., 140 Texas 586, 169 S. W. 2d 142; Air Transport Mfg. Co., Ltd., et al., v. Employers Liability Assur. Corp., Ltd., et al., 91 Cal. App. 2d 129, 204 P. 2d 647.

[16]Kenner v. Century Indemnity Co., et al., (Supreme Judicial Court of Massachusetts, 1946) 320 Mass. 6, 67 N. E. 2d 769, 165 A.L.R. 1463; Consolidated Shippers, Inc. v. Pacific Employers Ins. Co., et al., (District Court of Appeals, California, 1941) 45 Cal. App. 2d 288, 114 P. 2d 34; Traders & General Ins. Co. v. Hicks Rubber Co., et al., (Supreme Court of Texas, 1943) 140 Texas 586, 169 S. W. 2d 142; Central Surety & Ins. Corp. v. New Amsterdam Casualty Co., et al., (Kansas City Court of Appeals, Missouri, 1948) 216 S. W. 2d 527 (Reversed on ground of exclusions in two of the three policies involved, 359 Mo. 430, 222 S. W. 2d 76); Celina Mutual Casualty Co. v. Citizens Casualty Company (Court of Appeals, Maryland, 1950) 194 Md. 236, 71 A. 2d 20; Traders & General Ins. Co. v. Pacific Employers Ins. Co., et al., (District Court of Appeal, California, 1955) 276 P. 2d 628, 278 P. 2d 493; Commercial Standard Ins. Co. v. American Employers Ins. Co. (United States Court of Appeals, Sixth Circuit, 1954) 209 F. 2d 60; Maryland Casualty Co. v. Employers Mutual Liability Ins. Co. (United States District Court, Connecticut, 1953) 112 F. Supp. 272; Vrabel v. Scholler, et al., (Supreme Court of Pennsylvania, 1953) 369 Pa. 235, 85 A. 2d 858, 372 Pa. 578, 94 A. 2d 748.

[17]Zurich General Accident & Liability Ins. Co. v. Clamor (United States Court of Appeals, Seventh Circuit, 1941) 124 F. 2d 717; Travelers Indemnity Co. v. State Automobile Ins. Co., et al., (Court of Appeals of Ohio, 1941) 67 Ohio App. 457, 37 N. E. 2d 198; Michigan Alkali Co. v. Bankers Indemnity Ins. Co., et al., (United States Court of Appeals, Second Circuit, 1939) 103 F. 2d 345; Continental Casualty Co. v. Curtis Publishing Co. (United States Court of Appeals, Third Circuit, 1939) 94 F. 2d 710; Grasberger v. Liebert & Obert, Inc. (Supreme Court of Pennsylvania, 1939) 335 Pa. 491, 6 A. 2d 925, 122 A.L.R. 1201; Commercial Casualty Ins. Co. v. Hartford Accident & Indemnity Co. (Supreme Court of Minnesota, 1934) 190 Minn. 528, 252 N. W. 434 (Reh. den. 253 N. W. 888).

[18]Zurich General Accident & Liability Ins. Co. v. Clamor, 124 F 2d 717; Commercial Casualty Ins. Co. vs. Hartford Accident & Indemnity Co., 190 Minn. 528, 252 N. W. 434 (Reh. den. 253 N. W. 888).

[19]Travelers Indemnity Co. v. State Automobile Ins. Co., et al., 67 Ohio App. 457, 37 N.E. 2d 198; Michigan Alkali Co. v. Bankers Indemnity Ins. Co., et al., 103 F. 2d 345; Continental Casualty Co. v. Curtis Publishing Co., 94 F. 2d 710; Grasberger v. Liebert & Obert, Inc., 335 Pa. 491, 6 A. 2d 925, 122 A.L.R. 1201.

[20]108 F. 2d 653.

[21]161 F. 2d 62.

policy the court held that his insurer was in the position of guaranteeing the principal obligor and therefore its insurance was primary. In *Maryland Casualty Co. v. Bankers Indemnity Ins. Co.* (Court of Appeals of Ohio, 1935),[21] the court decided that the exclusion from the omnibus coverage was applicable, that the lessee was primarily liable for the tort, and that its insurer should be held liable.

In two cases decided since 1949 the courts have reached a conclusion contrary to the majority rule stated above, *Oregon Automobile Insurance Co. v. United States Fidelity & Guaranty Co.*, et al. (United States Court of Appeals, Ninth Circuit, 1952,[22] involved the owner's policy providing omnibus coverage, with an escape clause, and the driver's policy with a provision with respect to use of other automobiles, containing an excess provision. The court held that the provisions of the two policies were mutually repugnant and that the loss should be prorated between the insurers. *Continental Casualty Co., et al v. Weekes, et al* (Supreme Court of Florida, 1954)[23] involved a policy issued to the owner of a U-Drive-It corporation containing an omnibus provision with an escape clause, and a policy issued to the driver-lessee covering his car, with a provision covering him while driving another car as an excess insurer. The court concluded that because of the particular provisions[24] of the escape clause this policy did not constitute other valid and collectible insurance.

The so-called escape provision with reference to the omnibus coverage has been generally replaced in later policies by a prorata provision, and the cases discussed in the following section should be considered.

Prorata v. Excess

The cases decided since 1949 strengthened the conclusion that where the "other insurance" clause provides that the omnibus coverage shall apply prorata with other insurance, and the insurance afforded by the extended coverage of the driver's policy or another applicable policy contains a provision that it shall be in exess of other insurance, the latter coverage is excess insurance only and the former is primarily responsible.

Earlier cases include *Speier, et ux v. Ayling* (Superior Court of Pennsylvania, 1946);[25] *Trinity Universal Insurance Company v. General Accident, Fire & Life Assurance Corporation, Ltd. et al.,* (Supreme Court of Ohio, 1941);[26] and *Farm Bureau Mutual Automobile Ins. Co. v. Preferred Accident Ins. Co.* (United States District court, Virginia, 948).[27]

The later cases include the following: *Norris, et al., v. Pacific Indemnity Co., et al.,* (District Court of Appeals, California, 1951);[28] *American Surety Co. of New York v. American Indemnity Co., et al.,* (Superior Court of New Jersey, 1950);[29] *Aetna Casualty & Surety Co. v. DeMaison, et al* (United States District Court, Pennsylvania, 1953).[30] (The opinion does not state whether there were any limitations on the omnibus coverage and we assume that there was a prorata provision). In each of these cases the courts in effect held that the insurance afforded by the driver's policy, or under the non-ownership coverage, was limited to excess coverage, did not constitute other "valid and collectible" insurance within the meaning of the limitation of the omnibus coverage, and that the latter constitutes the primary coverage.

We have not examined a recent decision involving this combination of policy provisions which reached a contrary result.

Excess v. Excess

In *Employers Liability Assurance Corp. v. Pacific Employers Insurance Co., et al.,* (District Court of Appeal, California, 1951)[31] a policy issued to an employee of Salvation Army admittedly was primarily liable to the owner and Salvation Army to its limit of $10,000 for one injured person, the accident occurring while the employee was driving his car in the course of his employment. There were, in addition, two policies covering Salvation Army for the use of non-owned automobiles driven by employees in the course of their employment. One contained an excess provision. The other provided that it should

[21] 51 Ohio App. 323, 200 N. E. 849.
[22] 195 F. 2d 958.
[23] 74 So. 2d 367
[24] "The insurance does not apply * * * to any liability for such loss as is covered on a primary, contributory, excess, or any other basis by insurance in another insurance company."
[25] 158 Pa. Super. 404, 45 A. 2d 385.
[26] 138 Ohio St. 488, 35 N. E. 2d 836.
[27] 78 F. Supp. 561.
[28] 237 P. 2d 666 (Reversed on another ground, 39 Cal. 2d 420, 247 P. 2d 1).
[29] 8 N. J. Super. 343, 72 A. 2d 798.
[30] 114 F. Supp. 106.
[31] 102 Cal. App. 2d 188, 227 P. 2d 53.

be void in the event of other insurance, but that it should provide excess insurance if its limits were above the limits provided by such other insurance, and the court interpreted this as providing excess insurance over that afforded by the owner's policy. The court concluded that the two companies were concurrent insurers providing excess coverage, that their policies covered the same risk and neither could be primary.

Escape v. Prorata

Two cases were examined involving a policy containing an omnibus clause with an escape provision in the event of other insurance, with an additional provision that such insurance should constitute excess coverage if the limits were above the applicable limits of the other insurance, as related to a policy covering a lessee containing a prorata provision. A different result was reached in each case. In *Air Transport Manufacturing Co., Ltd., et al., v. Employers' Liability Assurance Corp., Ltd., et al.,* (District Court of Appeal, California, 1949),[31] the only question presented was as to the liability of the company providing the omnibus coverage, as there was a policy violation of the assured relative to notice which exonerated the other company. The court held that the only insurance which would have released the company from liability would have been an unconditional coverage of the loss, even though limited as to amount, and that the prorata coverage afforded by the other company was not other valid insurance within the meaning of such clause it. the policy. The court concluded that because of the prorata liability of the other company at the time of the accident, which to the extent of one half constituted other valid insurance, the company should only be liable for such coverage as was not afforded by the other policy, viz., one half. In *McFarland, et al v. Chicago Express, Inc.* (United States Court of Appeals, Seventh Circuit, 1952),[32] although the written lease provided that the lessor should furnish and operate the truck and indemnify the lessee against loss or damage resulting from negligence of a driver, the court held that because of the provisions in the omnibus coverage of the owner's policy it did not constitute other valid and collectible insurance within the meaning of the lessee's policy and the latter was held liable for the full amount of the loss.

Before closing this report, the other members of the committee should like to publicly thank members P. L. Thornbury and Robert C. Ely for the splendid articles which they prepared during the year, which were published in the January, 1955, issue of the Journal: "Joint Enterprise in Automobile Cases", by P. L. Thornbury and "Proof and Submission of Loss of Use", by Robert C. Ely.

Respectfully submitted,

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WILLIAM L. SHUMATE,
Vice-Chairman
A. FRANK O'KELLEY, *Chairman*

[31] 91 Cal. App. 2d 129, 204 P. 2d 647.

[32] 200 F. 2d 5.

Report of Aviation Law Committee—1955

GEORGE W. ORR, *Chairman*
Freeport, Long Island, New York

THE Committee on Aviation Law is continuing its efforts to keep the Association membership informed of developments in aviation and aviation law of interest to insurance counsel. Aviation progress continued in 1954. The scheduled airlines carried 3½ million more passengers than in any other year—a total of 35 million—and flew over 20 billion passenger miles. There were only 16 passenger fatalities in Domestic operations and none at all in Foreign operations. The total

passenger fatality rate reached a new low of 0.07 per 100 million passenger miles. This means that the scheduled airlines flew almost 1½ billion passenger miles for each passenger fatality.[1]

The progress in airline flying was outstripped by the growing importance of aviation to American industry. Some 6,000 companies operate more than 21,000 aircraft, an increase of 11% since the end of 1952. These aircraft range in size from single seaters to four engine transports, and several large oil companies have aircraft fleets of more than twenty airplanes.[2]

The above figures illustrate the growth of aviation and its increasing importance in the transportation field. They also show the growing potential of business for the insurance lawyer and the need for being informed about developments in aviation law.

RECENT DECISIONS OF INTEREST

The following decisions indicate the growth in aviation litigation and how the courts have recently applied common law principles to various factual situations.

LIABILITY FOR SURFACE DAMAGE

A U. S. District Court in New York granted a motion for summary judgment for damage caused by an airliner crashing into plaintiff's property. The court held that under New York law the crash of an airplane constitutes a trespass upon the property invaded and the plaintiff may recover without showing negligence or wilfulness on the part of the defendant.[3]

The U. S. Circuit Court of Appeals, Fifth Circuit, held that negligence cannot be inferred, under the doctrine of res ipsa loquitur, when an experimental Air Force jet explodes in mid-air and damages property on the ground. To invoke res ipsa, the plaintiff must establish that in the ordinary course of events such an accident would not occur if due care was exercised. The court thought there was insufficient knowledge as to the cause of jet aircraft explosions to permit the application of the doctrine here.[4]

These decisions represent different philosophies concerning an aircraft operator's liability for damage to property on the surface. Some states have, by statute, made the operator absolutely liable for such damage,[5] but the above Federal District Court decisions are the first ones to so interpret the common law. The Court of Appeals decision, requiring the plaintiff to prove negligence in order to recover and holding that res ipsa was inapplicable to an experimental flight, certainly seems more in line with past decisions and better law.[6]

BAILMENT

The bailee of an aircraft is not liable to the bailor for damage caused by a crash which resulted in fatal injuries to the bailee and a passenger in the absence of direct proof that the bailee and not the passenger was flying the airplane. The mere fact that the bailee was in the left seat, usually occupied by the pilot, both on take-off and after the crash was no evidence of who was flying the plane when the crash occurred.[7]

A bailor who rents a properly airworthy, licensed airplane to a licensed pilot, who crashed it into the plaintiff's house later in the day during an attempted take-off in substandard weather conditions, must be absolved of all liability therefor.[8] Further, the bailor of an aircraft is not liable for surface damage caused by the student of a flying school to which the plane has been bailed in the absence of a statute imposing liability. An airplane is no longer considered an inherently dangerous instrument nor is a student pilot necessarily incompetent.[9]

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[1]Preliminary CAB Statistics.

[2]"Soaring Salesman", The Wall Street Journal, Dec. 1, 1954.

[3]*Hahn et al v. U. S. Airlines, Inc.*, U. S. D. C. East. Dist. N. Y., July 14, 1954, 4 Avi. 17, 525, 127 F. Supp. 950.
Margosian v. U. S. Airlines, Inc., U. S. D. C., East. Dist. N. Y., January 6, 1955, 4 Avi. 17, 526, 127 F. Supp. 464.

[4]*Williams, et al.*, v. *United States*, U. S. C. A., Fifth Circuit, January 21, 1955, 4 Avi. 17, 187, 115 F. Supp. 386.

[5]Delaware, Hawaii, Minn., N. J., N. D., Tenn., Vt., Montana, Wyo.

[6]"Is Aviation Ultra Hazardous", Orr, Jan. 1954, Insurance Counsel Journal p. 48. "Res Ipsa Loquitur in Airline Passenger Litigation," 37 Va. L. R. 55, Jan. 1951.

[7]*Moritz v. Rivers, Adm.*, 1954 US&CAvR 181, Kansas Supreme Ct., March 6, 1954.

[8]*D'Aquila v. Pryor* 1954 US&CAvR 321, U.S.D.C., So. Dist. of N.Y. June 29, 1954.

[9]*Boyd v. White*, et al., Cal. Dist. Ct. of Appeals, Nov. 12, 1954, 4 Avi. 17, 485.

CONSTITUTIONAL LAW

The Supreme Court of California has recently held in several cases[10] that the states are free to regulate air carriage, including the rates of fare to be charged the passengers, when the entire journey is wholly within the state. The State Public Utilities Commission thus possesses jurisdiction to penalize airlines for charging a higher fare than that authorized by the State Commission even though the higher fare was approved by the CAB. The U. S. Supreme Court denied certiorari.

DEATH ON HIGH SEAS

The Federal Death on the High Seas Act[11] provides a cause of action for wrongful deaths occurring on the high seas more than a marine league "from the shore of any state, or the District of Columbia, or the territories or dependencies of the United States." This Act provides that the personal representative of the decedent "may maintain a suit for damages in the district courts of the United States, in admiralty". This has raised the question, on which different federal district courts have had different views, whether the action must be brought exclusively on the admiralty side of the federal court.

The recent case of *Wilson, Admx.* v. *Transocean Airlines,* in California[12] and *Higa, Admn.* v. *Transocean Airlines,* in Hawaii[13] affirm the position that the action lies only in Admiralty. An earlier, but fairly recent, case took a different view.[14] The opinion in the *Wilson* case is especially persuasive that the Act means that the action may be brought only in Admiralty, and an appellate court should have difficulty overcoming the reasons advanced for the conclusion reached by the judge in that decision.

[10] *People of the State of California* v. *Western Air Lines, Inc.,* State of California, Supreme Ct., April 2, 1954, L. A., 22881; 1954 US&CAvR 85. *People of the State of California v. California Central Airlines,* State of California Supreme Ct., April 2, 1954, L. A., 22880, 1954, US&CAvR 112. *People of the State of California v. United Air Lines, Inc.,* State of California Supreme Ct., April 2, 1954, S. F. 18900; 1954 US&CAvR 113. Certiorari denied, for want of a federal question.

[11] 46 USC 761 et seq.

[12] 1954 US&CAvR 191, U. S. D. C., N.D. of Calif., April 15, 1954.

[13] 1954 US&CAvR 269, U. S. D. C., Hawaii, October 1, 1954.

[14] *Sanchez* v. *Pan American World Airways,* 1953, 107 F. Supp. 519 (D.C.-Puerto Rico)

FEDERAL TORT CLAIMS ACT

Since the United States has assumed a role in operating civil airports and control towers which might be assumed by private interests, the government is liable for the negligent acts or omissions of its control tower operators. The duties of such operators do not involve the exercise of discretion and judgment but merely operational detail. In this case the tower operator failed to keep the pilots of two aircraft in the traffic pattern advised of the activities of the other and cleared both planes to land on the same runway at the same time.[15]

INSURANCE POLICY INTERPRETATIONS

Life and Accident Policies

The New York Court of Appeals[16] decided that the expression "civilian scheduled airline" is not at all free from ambiguity or vagueness, and the appellate court has no power to make findings as to its meaning. An automatic aviation accident insurance policy vending machine was placed at an airport in front of the counter of the "large irregular carriers" (who did not have a Certificate of Convenience and Necessity issued by the CAB), and the machine bore a sign with legends: "Domestic Airline Trip Insurance . . . covers . . . on any scheduled airline". A passenger on a "large irregular" carrier bought such a policy and lost his life on the flight. The beneficiary of the deceased passenger contended that the policy was ambiguous and the ambiguity should be resolved in her favor. The Court agreed, saying that it may be expedient to sell insurance through a vending machine but that the insurer must take additional precautions to make its coverage clear to the average man; otherwise, it might be unjustly enriched by premiums for which no service was offered.

A federal district court judge (Delaware)[17] decided that although a life insurance policy is ambiguous with reference to aviation coverage provided, the plaintiff

[15] *Eastern Air Lines, Inc.* v. *Union Trust Co.,* et al, U.S. C. A., Dist. of Col. Cir., February 8, 1955.

[16] *Marion E. Lachs* v. *Fidelity & Casualty Co. of* N. Y., 1954 US&AvR 229, Mar. 4, 1954

[17] *Wilmington Trust Co.* v. *Travelers Ins. Co.,* 1954 US&CAvR 301, U. S. D. C. Delaware, Sept. 14, 1954.

insured has the burden of proving facts resolving the ambiguity in plaintiff's favor. So, where two juries disagreed as to a verdict, the court finally receded from its former position and gave a summary judgment for the defendant insurance company.

Liability Policies

The U. S. District Court of Appeals, 8th Circuit,[18] decided that it is incumbent upon an insurance company to make its policies so clear that they contain no ambiguity as to their meaning, or they must be construed most strongly against the insurer. A private pilot, while inspecting the cockpit of a visiting aircraft, accidently started the engine and caused the airplane to crash into a hangar 100 feet away. The insurer under a comprehensive liability policy denied coverage for this damage because of exclusions, stating that the policy did not apply to the "use" of aircraft or to destruction of property used by or in the care, custody or control of the insured. The court found that the "use" of an aircraft does not include an inquisitive tampering with it, nor can a trespasser have care and custody of a parked airplane. Thus, the insurance company was required to pay a claim which it probably did not contemplate covering when the policy was written.

A military bomber plane, having been overhauled by the manufacturer, was taken up on a test flight by Air Force personnel; it flew into an apartment house and various liability claims for loss of life, personal injuries and property damage were asserted against the manufacturer, who had two mutually exclusive policies, one covering manufacturer's products liability, the other general flight liability. The Supreme Court of Washington[19] held that the general liability policy was applicable. It was customary for Air Force personnel to test-fly planes without terminating the bailment of the plane by the government to the manufacturer who overhauled it. The bailment for overhaul did not terminate until the repaired plane was accepted by the Air Force as satisfactory. The manufacturer's products liability policy did not apply until the airplane was delivered to the customer. (Affirming the Trial Court.)

The liability insurance policy excluded coverage for accidents in violation of any government regulation for civil action. A regulation prohibits aerobatics unless the occupants are equipped with parachutes. The occupants in this case did not have parachutes and were killed as a result of aerobatic maneuvers, but the airplane was so low that the parachutes could not have saved them. The exclusion was held applicable because causal connection between the violation and death is not required in North Carolina.[20]

PLEADINGS AND PRACTICE

The U. S. District (Southern of New York) Court[21], February 1954, held that a plaintiff in an action against an air carrier, arising out of an accident, may be allowed to use depositions taken in other actions arising out of the same accident. The defendant in this action had the same motive to question or cross-question the deponents in the early actions as it would in the instant one. In view of the fact that there was another defendant in the earlier cases, certain portions of the depositions may be inapplicable and those portions should be eliminated.

SALVAGE AT SEA

A pilot rented a seaplane and flew out to sea where he circled a Polish transatlantic liner, The Batory, numerous times claiming to be lost and out of gas. (This was not true). He landed and both the pilot and seaplane were taken on board, and the ship proceeded to Southampton, England, its destination. Action was brought for conversion of the seaplane.[21a]

The U. S. Circuit Court of Appeals, Second Circuit, decided that a seaplane is a "vessel" subject to salvage; that the pilot who requested aid had to be rescued under penalty of the U. S. Code, which makes it a crime not to aid a person found in peril at sea; and that the ocean liner acted reasonably in carrying the seaplane to the next scheduled port of call rather than in-

[18] *Great American Indemnity Company of New* York v. Saltzman, U. S. District Court of Appeals, 8th Circuit, 1954 US&CAvR 229.

[19] *Eagle Star Insurance Co. Ltd., et al.,* v. *Boeing Airplane Co.* State of Washington Supreme Court, March 30, 1954, US&CAvR 115.

[20] *Bruce* v. *Lumbermens Mutual Casualty Co.,* U. S. D. C., East. Dist. N. C., Dec. 15, 1954, 4 Avi. 17, 509.

[21] *Scott v. National Air Lines,* 4 Avi. 17, 278; 15. F. R. D. 502, 1954, US&CAvR 299.

[21a] *Lambros Seaplane Base, Inc.* v. *M/S Batory,* etc., 1954 US&CAvR 273, U. S. C. C. A. 2nd Circ., August 17, 1954.

cur delay necessary to deliver the seaplane to a port nearer the home of the owner.

The trial court had concluded that the ship's master was negligent in not ascertaining the true facts concerning the flight and acted unreasonably under the circumstances. The facts in this case speak of complete disregard for the rights of the aircraft owner by the ship's captain, and the reversal of the trial court's judgment, which had heard the evidence, seems open to question.

TAXATION

The New York Court of Appeals in July 1954 affirmed without opinion a lower court decision holding that the City of New York cannot impose a Gross Receipts Tax on an allocated portion of the traffic revenues of an interstate carrier airline, one of whose terminals is in New York City.[22]

The United States Supreme Court held that a state (Nebraska) may assess and collect an ad valorem tax on the tangible aircraft property of an interstate air carrier (operating pursuant to Federal certificate of convenience and necessity and the recipient of Federal air mail and Federal subsidy payments), if the tax is fairly apportioned in relation to the benefits and protection which the air carrier and its taxed property receive from the taxing state. Such a tax is not an unconstitutional burden on interstate commerce. The Nebraska tax under its 1943 law was fairly apportioned. The power of the states to tax aircraft property of air carriers used in the state (the airline's aircraft made 18 scheduled stops in the State) is analogous to their power to tax vessel property operated on the interstate and navigable waters of the United States.[23]

TARIFF REGULATIONS

The Circuit Court of Appeals, Fifth Circuit, affirmed a summary judgment in favor of an airline which pleaded the limit of $100 in its Tariff filed with the CAB.

The passenger's estate asked $15,275 for the destruction of her baggage and personal effects in a crash which caused her death.

The court held that passengers in domestic airliners are bound by provisions of Rules Tariffs filed with the CAB and open to public inspection, and the word "baggage" includes articles which the passenger wears on his person, carries in his clothing, or keeps in his hands, such as a pearl necklace, a jeweled clip, a mink jacket, and the contents of a cosmeitc bag.[24]

WARSAW CONVENTION

The Appellate Division[25] of the New York Supreme Court reversed a judgment of the Superior Court that a passenger had established willful misconduct on the part of the airline defendant and was thus entitled to a recovery in excess of the limit specified in the Warsaw Convention (approximately $8,300.). The Appellate Court concluded that the plaintiff had failed to establish willful misconduct where no evidence was submitted to show that the alleged violation of Civil Air Regulations were the proximate cause of the accident or that such violations were the result of willful misconduct on the part of the carrier. The New York Court of Appeals affirmed the reversal and the U. S. Supreme Court denied certiorari.[26]

In the well publicized case of *Froman* v. *Pan American*[27] the defendant conceded its liability for the limited amount provided by the Warsaw Convention, but denied any willful misconduct, proof of which would entitle the plaintiff to an unlimited recovery. A jury found no wilful misconduct and the trial judge directed a verdict for the Convention limits. The Appellate Division and N. Y. Court of Appeals affirmed without opinion. The plaintiff applied to the U. S. Supreme Court for a Writ of Certiorari, which was denied in May, 1955.

The New York Supreme Court[28] held that an airline was absolved from liability under Article 20 of the Warsaw Convention where cargo was lost due to an airline crash caused by negligent piloting. Article 20 exculpates an airline from liabil-

[22] *United Air Lines* v. *Joseph*, 1953 US&CAvR 313, 282 App. Div. 48.

[23] *Braniff Airways, Inc.* v. *Nebraska Board of Equalization and Assessement*, U. S. S. C., June 1, 1954. 1954 US&CAvR 347, U. S. 590; 1954 US&CAvR 127.

[24] *Wadel* v. *American Airlines*, U. S. C. C. A., 5th Circuit, June 4, 1954; 1954 US&CAvR 167.

[25] *Goepp* v. *American Overseas Airlines*, 3 Avi. 18, 057; 1952 US&CAvR 486.

[26] 1951 US&CAvR 527 and 529; 114 N.E. (2d) 37; 305 N. Y. 830.

[27] 284 App. Div. 953, 285 App. Div. 806, 308 N. Y.—(not yet reported).

[28] *American Smelting and Refining Co.* v. *Philippine Airlines, Inc. of Manila*, N. Y. Supreme Court, June 21, 1954; 1954 US&CAvR 221.

ity if it establishes that it took "all necessary measures to avoid the damage or that it was impossible . . . . . to take such measures." It further provides that "In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of aircraft, or in navigation and that, in all other respects, he and his agent have taken all necessary measures to avoid the damage". (49 U. S. Stat. 3019)

The U. S. District Court for the Southern District of New York decided that where a passenger commences an action within two (2) years as required by the Warsaw Convention and subsequently dies, more than two years after the accident, the personel representative of the deceased would have two years after the death to bring a new action.[29]

A Federal District Court judge set aside a jury verdict finding the defendant guilty of willful misconduct and awarding a judgment for a sum in excess of the Convention limit. The evidence was insufficient to sustain the allegation of willful misconduct. The court also found that the damages awarded were excessive and must be set aside.[30]

NATIONAL AND STATE LEGISLATION

A Uniform Aircraft Financial Responsibility Act, patterned along the lines of the Automobile Financial Responsibility Laws in effect in forty-four states, has been approved by the National Conference of Commissioners on Uniform State Laws and the House of Delegates of the American Bar Association. This proposed legislation was approved and promulgated by those two organizations at their August 1954 meetings.[31]

Two states, Illinois and Indiana, now have aircraft financial responsibility laws on the books[32] and the other state legislatures may be expected to consider the new Uniform law in the next year.

The Act provides for the posting of security following an accident unless the aircraft operator has in effect an aircraft liability policy, has posted bond, or qualified as a self-insurer. Failure to comply with these requirements usually will result in suspension of operating privileges within the state unless the Agency determines that the operator was not responsible for the accident.

The terms of the insurance policy required by the Act including minimum liability limits as well as the type of carrier to be approved are set forth. For bodily injury, excluding passengers, the limits are $5,000 per person and $10,000 per accident. The passenger liability limits are $5,000 per passenger except where the aircraft is operated for hire a minimum limit of $10,000 per passenger is required. The property damage limit is $5,000.

The Act does not apply to government owned or operated aircraft. Nor does it apply to aircraft operated by a public air carrier engaged principally in regularly scheduled interstate or foreign air transportation for hire. The Act contains a provision for reciprocal action for nonresidents of states which have similar laws.

INTERNATIONAL TREATIES AFFECTING LIABILITY

Warsaw Convention

This treaty, which deals with the liability of air carriers for injury or damage to persons, baggage or goods in international transportation, is the only International Aviation Treaty affecting the liability of parties presently in effect.[33] It has given generally satisfactory results, but for several years there has been a movement on foot to revise this Convention. Last year's report of this committee covered the principal changes of interest in the proposed revision of the Warsaw Convention.

The draft Protocol prepared by the Legal Committee at its Ninth Session in Rio de Janeiro[34] was circulated for comments and on 2 April 1954, the ICAO Council noted that comments had been received from fifteen states and these were in general favorable. The Council has called a conference for the finalization of the Protocol to amend the Warsaw Convention on or about 6 September 1955 at The Hague.

It was intended that any revision of the Convention should be accomplished by a comparatively short and simple Protocol, in preference to a complete revision of the

[29] *Nicolet, Executrix v. Trans World Airlines, Inc.* U. S. Dist. Ct., So. Dist. of N. Y., June 17, 1954, Civil Action 90-113, 1954 US&CAvR 117.

[30] *Grey, et al., v. American Air Lines, Inc.*, U.S. Ins. Co., et al., (Cal. App.) 278 P. 2d 493.

[31] No official publication yet.

[32] Illinois Laws 1949, S. D. 530—Indiana Laws 1951, Chap. 267.

[33] 49 Stat. 3000, 1934.

[34] ICAO Doc. 7425.

Convention. After further consideration, however, difficult legal problems were anticipated in the event the Protocol was accepted by some, and rejected by others, of the present High Contracting Parties. Therefore a special Sub-Committee of ICAO, at an April meeting in Madrid recommended that the document to be considered by the Diplomatic Conference shall be a new convention containing a provisio that it shall not become effective until it has been ratified by an agreed percentage of those states now Parties to the Convention and until such ratification the existing Convention remains applicable. The Diplomatic Conference may, or may not, act on the recommendations of the Sub-Committee, and it is questionable whether the present Convention, which is one of the most widely adopted international treaties in history should be tampered with at all.[35] There is a distinct possibility that some nations, including our own, may choose to denounce the Convention when the matter of amending or revising it is presented for consideration.

Rome Convention of 1952

The convention on Damage caused by Foreign Aircraft to Third Parties on the Surface has been signed by the delegates of the following States: Argentina, Australia, Belgium, Brazil, Canada, Denmark, Dominican Republic, France, Israel, Italy, Liberia, Luxembourg, Mexico, Netherlands, Philippines, Portugal, Spain, Switzerland, Thailand, United Kingdom. However, the Convention has been ratified by only one State, namely Egypt on 23 February 1954[36] and the Convention will not come into force until five states have deposited their instruments of ratification with ICAO."

Draft Convention on Aerial Collisions

The Legal Committee of the International Civil Aviation Organization has prepared a draft Convention on Aerial Collision.[38] This is not a final draft but only represents a stage of the Committee's study of the subject of aerial collisions.

The draft of this Convention follows generally the unjust and arbitrary paternalistic ideology of the Rome Convention, the original of which has been repudiated by most nations for two decades, and of the more drastic revision of 1952, which also is finding little enthusiasm for ratification.[39]

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[35] Orr, "The Rio Revision of the Warsaw Convention"; The Journal of Air Law and Commerce, Winter, Spring 1954.

[36] Letter of December 2, 1954, Legal Officer of ICAO.

[37] 1954 US&CAvR p. XIII.

[38] LC /Working Draft No. 465.

[39] Orr, "Rome Convention Revision", Insurance Law Journal, May 1952.

Report of Casualty Committee—1955

PART 1

USE OF EXPERIMENTS AND TESTS IN TRIAL PERFORMED BOTH IN AND OUT OF COURT

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IN the field of trial practice in general, and personal injury litigation in particular, there has been a continuous increase in the use of tests and experiments performed in the courtroom and the evidence of tests and experiments performed out of court. The growth and acceptance of this type of evidence presents opportunities for highly effective methods of presentation, largely limited only by the in-

genuity of counsel and insurance company representatives. Most attorneys are familiar with numerous examples of the dramatic effect of experiments performed in the courtroom and many amusing stories have been told regarding them, some of which backfired disastrously. No effort is made in this report to recount any such instances because, although highly entertaining, we find no record of such cases in the appellate reports. However, the existence of such stories has a moral which is readily apparent, to the effect that the use of experiments as evidence should be exercised with great caution and discretion.

Only a few very simple general rules can be drawn from the reported cases. By the very nature of this type of evidence each case presents distinctive problems. The admission or exclusion of such evidence ordinarily is largely within the discretionary power of the trial court. Appellate courts seem reluctant to overrule a decision of the trial court except in cases where the admission or exclusion of such evidence was clearly prejudicial, and clearly erroneous under the facts and circumstances of the particular case. The presence or absence of a sufficient and proper foundation is usually the test applied, and is frequently determinative of the decision of the court as to its admissibility. In general, the conditions under which the experiment or test is performed must be shown to be substantially the same as the actual occurrence in all material details as a prerequisite to the admission of such evidence.

Following is a brief resume of the cases we consider as best illustrative of each type of situation to be found in the reported cases. No attempt has been made to cite all cases on the subject, but we believe nearly all types of situations reported have been covered.

Courtroom Experiments Where Such Evidence Was Admitted

Pennsylvania Coal Co. v. Kelly, 156 Ill. 9, 40 N.E. 938, was an action for personal injuries received while shoveling coal into a bucket by means of which it was removed from a vessel. The plaintiff was allowed to demonstrate before the jury with a model of the bucket and with small pieces of coal and a pan, how the bucket operated when in actual use.

Ley v. Bishop, 263 Pac. 369, 88 Cal. App. 313, was an action to recover damages for injuries due to the alleged negligence of defendant dentists in the preparation of casts from which removable bridges were to be made for the plaintiff. These casts were made of a mixture of plaster of paris, potassium sulphate and water, and plaintiff contended that due to improper mixture the casts had burned his mouth.

Plaintiff's experts testified that the degree of heat produced by such a mixture would vary with the temperature of the water and the proportions of the other ingredients. One expert was allowed to perform tests in the presence of the jury using differing proportions of the ingredients and water at different temperatures for the purpose of showing the various degrees of heat that might result. This evidence was admissible.

Stephens v. Elliott, 36 Mont. 92, 92 Pac. 45, was an action for personal injuries received while operating a device for hoisting ore owned and operated by the defendant. Plaintiff's doctor testified that the motor nerves of plaintiff's right arm were entirely destroyed, and that the sensory nerves, which control the feeling in the hand, were so paralyzed that plaintiff had no feeling in his hand. The doctor was then permitted to stick a hypodermic needle into the back of plaintiff's right hand. This evidence was admissible.

Sicard v. Kremer, 13 N.E. 2d 250, 133 Ohio State 291, was an action for damages for personal injuries received by the plaintiff from contact with a hair dye distributed by the defendant, while this dye was being used in the plaintiff's beauty parlor. An expert witness for the plaintiff, in order to illustrate the action of hydrogen peroxide, placed his finger in a solution of this hydrogen peroxide and then removed his finger from the solution, showed the jury how it had whitened his finger, after which he placed his finger in a glass of water. This experiment was admitted by the court in connection with the other evidence of the city chemist in regard to the effect of the hair dye in question on the human skin. The admission of this experiment was proper.

In *Finch v. Roach Co.,* 295 N.W. 324, 295 Mich. 589, plaintiff sued for injuries received from falling from a defectively constructed ladder furnished him by the defendant. To show that the ladder was defectively constructed, plaintiff's witnesses

secretly entered defendant's orchard and measured and photographed a ladder found there which they claimed to be exactly like the one from which plaintiff fell. From the measurements then taken a model was constructed by a carpenter and admitted in evidence. By use of this model an expert witness for the plaintiff testified that the ladder was so constructed that there were several parts on the platform which were outside the range of stability. It was also stated that if a man placed his weight on one of these parts, the ladder would tip over. The court held the admission of this evidence proper.

Larramendry v. Myres, 126 Adv. Cal. App. 782, 272 Pac. 2d, 824, was an action for damages by a minor plaintiff when a smoke producing device, sold by the defendant, and used by the plaintiff in a dancing act, set fire to her dress. The court permitted a demonstration of the operation of the device to be made in the courtroom during the trial. The fire chief of Ventura, an expert witness called by the plaintiff, operated the device by following the directions furnished by the defendant and used powder that came with the device. In the demonstration the witness held tarlatan, which was part of the plaintiff's dress, about 10 inches above the device, and the fire hit the tarlatan and caused it to smolder or glow, but it did not blaze. Defendant's attorney argued that conditions were dissimilar here as there was no evidence that draught conditions were the same as the draught conditions on the stage at school when the accident occurred. The court held that there was no error in permitting a demonstration of the operation of the device to be made in the courtroom.

Kalash v. Los Angeles Lumber Co., 1 Cal. 2d, 229, 34 Pac. 2d, 481, is an illustration of a case of impeachment of an expert witness for the plaintiff by means of an experiment. This was an action for personal injuries due to a fall by the plaintiff from a broken rung of a ladder manufactured by the defendant. Plaintiff's witnesses testified that the rung was faulty and that a reasonable inspection would have disclosed the defect. Defendant's attorney then exhibited certain specimen rungs designated as Exhibits A, B and C for inspection. One witness testified Exhibit A was unfit for use, and another witness testified that Exhibit C was unfit for use. Exhibit A was then put to a weight test and not only stood the standard test of 800 lbs., but actually stood 936 lbs. before fracturing. Exhibits B and C also withstood the weight test without fracturing. These tests were admitted for the purpose of qualifying the "experts".

Osborne v. Detroit, 32 Fed. 36, was a personal injury action in which the plaintiff claimed to have been paralyzed by a fall. It was held not error to permit a medical attendant to demonstrate the loss of feeling on the part of plaintiff by thrusting a pin into her face, arm and leg, from which the jury was asked to infer, she having failed to wince, that her right side was completely paralyzed.

Bowerman v. Columbia George Motor Co., 132 Ore. 106, 284 Pac. 579, was an action for injuries resulting from an automobile collision. Plaintiff was allowed, over objection, to remove her glass eye in the presence of the jury. This evidence was admissible.

Willoughby v. Zylstra, 5 Cal. App. 2d, 297, 32 Pac. 2d, 685, was a personal injury action in which plaintiff's medical witness was permitted to physically manipulate the neck and to pinch the cervical vertebra of the plaintiff, thereby causing her to cringe and twist and by her facial expression and contortions indicate pain.

Florida Motor Lines v. Bradley, 121 Fla. 591, 164 Southern 360, was a personal injury action in which a doctor who was showing the jury the injured woman's leg was permitted to endeavor to flex her knee, thereby causing her to cry out in pain. It was held not error to allow this demonstration.

Arkansas River Packing Co. v. Hobbs, 105 Tenn. 29, 58 S.W. 278, was another action in which the plaintiff was permitted to manipulate his injured leg and knee. The demonstration was held to be proper.

Missouri, K. and T. R. Co. v. Lynch, 30 Tex. Civil Appeals 533, 90 S.W. 511, was an action in which a doctor was permitted to stick pins into plaintiff's legs above the knees, to demonstrate their lack of sensibility and also to cause plaintiff nearly to fall to the floor by taking away from him one crutch and then forcibly removing the other. This was held to be a proper demonstration.

Sullivan v. Minneapolis, St. Paul & Sault St. Marie Railroad Co., 55 N.D. 353, 213 N.W. 841, was a personal injury action in which after testimony as to plaintiff's ankle clonus, a demonstration of how his foot trembled when pressure was applied in a certain manner was held admissible.

Tindall v. Chicago & N.W. Railroad Co., 200 Ill. App. 556, was an action in which plaintiff was permitted to show how fast she could open and close her hand.

Herter v. City of Detroit, 222 N.W. 774, 245 Mich. 425, was a personal injury action in which plaintiff's arm had been crushed between a truck and a car. Plaintiff's medical witness bared plaintiff's arm and testified that in moving both the shoulder and elbow joint there was a sound "much like an old-fashioned coffee grinder". He then illustrated the testimony by the use of plaintiff's arm. This was held not to be error.

Smith v. Corrigan, 101 N.W. 330, 72 Neb. 657, was a personal injury action in which plaintiff alleged that he was injured by a fall on the street. He was allowed to walk before the jury in his crippled condition despite defendant's contention that such action aroused the sympathy of the jury.

Similar walking demonstrations were allowed in *Birmingham Railway, Light & Power Co. v. Rutledge*, 39 Southern 336, 142 Ala. 195, and in *Harvey v. Fargo*, 91 N.Y. Supp. 84, 99 App. Div. 599.

Adams v. City of Thief River Falls, 86 N.W. 767, 84 Minn. 30, was a personal injury action in which plaintiff claimed a permanent injury to her arm. She was permitted to illustrate the nature and extent of her injury to the jury. The allowance of such experiment was not error.

Southern Railway Co. v. Brock, 64 S.E. 1083, 132 Ga. 858, was a personal injury action in which an eighteen-year old boy had been run over by a train, requiring the amputation of both legs below the knees. He testified that he could walk a little on his knees and also use a rolling chair. He was permitted to so walk before the jury and this demonstration was held proper.

Pittsburgh, C. C. & St. Louis Railway Co. v. Lightheiser, 78 N.W. 1033, 168 Ind. 439, was a personal injury action in which plaintiff had been hit by a train. Plaintiff was allowed to exhibit his injured foot to the jury, and to testify that it was stiff at the ankle joint, and upon movements to show the effects of the injury on his ability to use it.

Clock v. Brooklyn Heights Railway Co., 69 N.W. 647, 177 N.Y. 359, was a personal injury action in which plaintiff was allowed to show his nervous affliction by taking a glass of water with both hands and spilling it due to trembling. And also to the same effect by writing his name, and using his handkerchief.

Anthony v. Public Transit Co., 130 Atl. 895, 3 N. J., Mis. R. 1204, was a personal injury action for injuries received on a bus. A needle was stuck in plaintiff's arm to show that plaintiff was suffering from paralysis and his arm lacked sensation. To permit such a demonstration was held not error.

Courtroom Experiments Where Such Evidence Was Excluded

Ohio Power Co. v. Fittvo, 173 N. E. 33, 36 Ohio App. 186, was an action against a power company for damages due to alleged electrocution by coming in proximity with sagging electric wires. The trial court refused to allow certain experiments to be conducted in the presence of the jury for the purpose of demonstrating to them the distance that the number of volts on the line in question would arc or jump from wire to wire.

Harper v. Blasi, 151 Pac. 2d 760 (Colo.), was an action for assault in which a witness for the defendant was permitted to detail an experiment conducted with a mask, an artificial eye, and rimless glasses, ostensibly to determine whether a blow struck as plaintiff had testified could have resulted in the alleged injury. On appeal it was held that "the entire performance smacked of the playful antics of juveniles." Its admission was clearly error.

Daniels v. Stock, 23 Colo. App. 529, 130 Pac. 1031, was an action for damages on account of an alleged wound between the knee and ankle, which plaintiff claimed to have received while bathing in one of defendant's bath tubs in their public bath house. It was held that the trial court did not commit error in excluding the testimony of a witness, and a demonstration offered to be made by him in a bath tub,

for the purpose of showing that it was impossible for a person to receive a scratch in the forepart of the leg between the knee and the ankle from a defect such as was alleged to have existed.

Hatfield v. St. Paul & D. R. Co., 22 N.W. 176, 33 Minn. 130, was a personal injury action in which plaintiff had fallen from the steps of defendant's car, injuring the sciatic or great nerve of her thigh. She testified that the injury had caused her to limp in walking. Defendant's counsel requested the court to direct her to walk across the courtroom. The court refused and such refusal was held not to be error.

Madison Coal Corp. v. Altmire, 284 S.W. 1068, 215 Ky. 283, was an action in which the plaintiff's attorney was allowed to prick his client's body with a needle in the presence of the jury. The allowance of such a demonstration was held to be reversible error.

Vance v. Monroe Drug Co., 149 Ill. App. 499, was a case in which jurors had been permitted to manipulate an injured plaintiff's hand for the purpose of determining its ability, and permitting plaintiff to grasp the jurors' wrists. These demonstrations were held to constitute prejudicial error.

Stewart v. Weiner, 187 N.W. 121, 108 Neb. 49, was an action for injuries to plaintiff's hands as a result of fire caused by defendant's alleged negligence. Plaintiff was permitted to shake hands with each of the jurors to show the weakened grip in his injured hand. Although a new trial was granted on other grounds, the court stated that this was demonstrative evidence of a very doubtful character.

Galliaer v. Southern Harlan Coal Co., 57 S.W. 2d 645, 247 Ky. 752, was an action for damages for injuries to plaintiff caused by a block of slate falling upon him in a mine. After medical testimony on both sides as to the nature and extent of plaintiff's injuries, one of plaintiff's doctors was asked whether he was willing to put pressure on plaintiff's back as he lay on his stomach before the jury. Defense objection was sustained. It was held that this ruling was proper.

Willis v. City of Browning, 143 S.W. 516, 161 Mo. App. 461, was an action against the City for negligent maintenance of one of its streets upon which plaintiff had fallen. Plaintiff was allowed over defendant's objection to attempt to walk without her crutches. It was held that to permit such a demonstration was error.

Homan v. Franklin County, 68 N.W. 559, 98 Iowa 692, was a personal injury action in which plaintiff's medical expert stated that the dilated condition of plaintiff's eyes was traceable to an abnormal condition of the heart and was permitted without objection to make certain experiments with plaintiff's eyes in the presence of the jury.

Defendant then offered to make the same experiment with a normal person to show that the same results would be produced. The trial court sustained plaintiff's objection on the ground that the court did not have time to find a normal man. On appeal the supreme court held that there was no error in this ruling.

Stearns Coal & Lumber Co. v. Williams, 198 S.W. 54, 177 Ky. 698, was an action for damages for injuries caused to plaintiff, an electrician, when he came in contact with certain wires and sustained a shock. The court refused to permit an expert electrician to show that the volume of electricity which was passing through the wires could be withstood by plaintiff without injurious results. This refusal was approved.

Jordan v. Velozo, 168 N.E. 792, 269 Mass. 347, was a personal injury action by an employee for the loss of his right hand. The defense sought permission of the court to hook up and operate in the courtroom a sausage machine similar to the machine by which the plaintiff was injured. The court refused to permit this experiment. The experimental machine was of less horsepower than the one that the plaintiff was using, and it was so constructed that the revolving worm which carried the meat to the knives moved faster. The trial court's ruling was approved.

Ong. vs. Pac. Finance Corp. of Calif., 222 Pac. 2d 801, 70 Ariz. 426, was an action for injuries sustained by the plaintiff in a fall on the floor of defendant's office. The plaintiff proposed to make a demonstration of Johnson's Wax in the presence of the jury for the purpose of comparing her sensation of feeling at the time she fell, with the sensation of feeling produced by the test. The court refused to permit the demonstration since such experiment would have borne no resemblance to the

condition of the floor at the spot in the office of the company where the plaintiff allegedly slipped and fell.

In *Raymond vs. J. R. Watkins Co.*, 88 Fed. Supp. 932, the plaintiff brought an action for damages for a complete loss of hair following the purchase and use of a bottle of shampoo manufactured and sold by the defendant. The defendant sought permission of the court to work an experimental shampoo in court by the application of the product to a young lady in the presence of the jury. The court denied permission for this experiment since no claim was made that such use would cause instantaneous loss of hair. The loss claimed here occurred over a period of several months.

In *Stroeter v. National Pressure Cooker Co.*, 50 Fed. 2d 642, the plaintiff sought damages for injuries resulting from the explosion of a steam pressure cooker sold by the defendant. The plaintiff was cooking chili sauce in the cooker and a part of the mixture was tomatoes from which the seeds had not been removed. Plaintiff claimed that tomato seeds had clogged the openings and interfered with the operation of the petcock and steam gauge. The defendant contended that tomato seeds could not have reached the openings during the process of cooking under steam pressure and offered to perform experiments in court to show that the seeds could not get into the openings. The court refused permission for the experiment because of the difficulty, if not the impossibility, of reproducing the exact situation.

Lie Detector Tests

The courts, in the absence of stipulation, almost uniformly reject the results of lie detector tests when offered in evidence for the purpose of establishing the guilt or innocence of one accused of crime. The reason most commonly assigned for such exclusion is that the lie detector has not yet attained scientific acceptance as a reliable and accurate means of ascertaining truth or deception. The following are late cases representing this view:

California—*People v. Wochnich*, 98 Cal. App. 2d 124, 219 Pac. 2d 70.

Kansas—*State v. Lowry*, 163 Kan. 22, 185 Pac. 2d 147.

District of Columbia—*Frye v. United States*, 54 App. D.C. 46, 293 Fed. 1013.

Missouri—*State v. Coal*, 354 Mo. 181, 188 S.W. 2d 43.

Nebraska—*Boeche v. State*, 151 Neb. 368, 37 N.W. 2d 593.

North Dakota—*State v. Pusch*, 46 N.W. 2d 508

Oklahoma—*Henderson v. State*, 230 Pac. 2d 495

Wisconsin—*Leferre v. State*, 242 Wis. 416, 8 N.W. 2d 288.

For a case in which the results of a lie detector test were ruled admissible in the absence of a stipulation, see *People v. Kenny*, 167 Misc. 51, 3 N. Y. Supp. 2d 348

If both parties have stipulated in writing that the results of the test be received in evidence, some courts will admit such evidence.

California—*People v. Hauser*, 85 Cal. App. 2d 686, 193 Pac. 2d 937.

Kansas—*State v. Lowry*, 163 Kan. 622, 185 Pac. 2d 147, wherein although the court excluded the results, it stated that if the parties had stipulated the evidence would have been admissible.

Experiments Made Out of Court Where Evidence Thereof Was Admitted

Carpenter v. Kurn, 157 S.W. 2d 213, 348 Mo. 1132, was a wrongful death action in which deceased had been struck by defendant's train. Plaintiff's witnesses testified that after the accident they made tests for the purpose of ascertaining the distance one standing on the track could tell that a person sitting in the same position and dressed as deceased had been dressed was a human being. Although the witnesses were on foot rather than in the cab of a moving train the admission of the evidence was held to be proper.

Danciger Oil & Refining Co. v. Donagy, (Oklahoma) 238 Pac. 2d 308, was an action by a property owner against an oil well owner to recover damages for permanent injuries to his water well from salt water and other polluting substances. Plaintiff's contention was that defendant had permitted salt water to escape from his land and to run into plaintiff's fresh water well. Plaintiff testified to the following experiment:

> That he had pumped several gallons of water from the well soon after the incident and had poured this water from time to time into several pyrex dishes.

When the water was entirely evaporated, a sediment or residue was contained in these dishes, and that the sediment was salt.

Admission of evidence of these experiments was held to be proper.

Nichols v. McCoy, 240 Pac. 2d 569, 38 Cal. 2d 447. In the trial court evidence of the results of a blood test made by the coroner's office which revealed the presence of alcohol in decedent's body were admitted over the contention that there was no proof that the blood tested was that of the decedent. The blood samples had been collected from the undertaker and labeled with decedent's name prior to analysis. It was held this evidence was properly admitted.

Coon v. Utah Construction Co. (Utah, 1951), 228 Pac. 2d 997, was an action for damages for enlargement of cracks in the foundation and masonry walls of plaintiff's home, allegedly due to excessive vibration caused by the operation of defendant's trucks over a highway adjacent to plaintiff's home. Defendant went onto plaintiff's land with a specialist for the purpose of measuring the vibration caused by his trucks. Evidence of the tests to effect that the vibration from the trucks hardly registered on the testing device, and that the act of a person walking across the dining room floor resulted in a much greater vibration, was properly admitted.

McComb v. C. A. Swanson & Sons (Nebraska), 77 Fed. Supp. 716, was an action by the Wage and Hour Administrator to enjoin an employer from violating the F.L.S.A. The issue was whether the employer was failing to compensate his employees for work in excess of 40 hours a week at the statutory rate in violation of Sections 7 and 15 of the Act. The court found such violation existed in that the employees were not compensated for time spent in changing into a prescribed work uniform before work and for time spent in changing clothes after work.

Tests were conducted by the employer showing an average time per day spent in dressing which was considerably less than the time allowed by the court's findings. Evidence of these tests was held to be competent as indicating the time needed for dressing operations, but was not conclusive in that the tests were conducted by one or two individuals, whereas there were often many more in the dressing rooms at one time.

Amsbary v. Gray's Harbor & Light Co., 139 Pac. 46, 78 Wash. 379, was an action for wrongful death caused by alleged negligence of defendant in the operation of a streetcar. The principal claim was that defendant's motorman did not exercise due care in observing the track ahead of the car and discovering the deceased at the side of the track in time to stop the car before hitting him. For the purpose of showing the greatest distance at which the deceased could be seen from the approaching car, defendant offered testimony of witnesses as to the following tests performed after the accident and under substantially the same conditions:

Defendant made a dummy in the form of a man, dressed it as deceased was dressed at the time of injury and placed it in the position that deceased was when injured. The witnesses, knowing of the dummy's presence boarded the same car, driven by the same motorman and looked through the motorman's window.

Plaintiff's objection to the admission of the testimony was sustained, but on appeal the exclusion was held to be error, and a new trial was granted.

Kohlhagen v. Cardwell (Oregon, 1919), 184 Pac. 261, was an action on a promissory note. Defendant admitted the note but claimed payment by delivery of 36 head of hogs, which plaintiff denied. Defendant testified that the hogs had been delivered in two wagons. Plaintiff offered testimony of the results of an experiment whereby only eight hogs of a similar weight and size could be loaded into an average-size wagon. The trial court admitted the testimony and the ruling was affirmed on appeal.

Sonoma County v. Stofen, 125 Cal. 32, 57 Pac. 681, was an action against the county treasurer for a balance of county funds in his hands. Defense was that he had been robbed of the money, and that the robber had knocked him down and left him unconscious and locked in the vault, where he remained for a number of hours. The vault was in his office, and was connected by doors with the sheriff's office in another part of the building. He

claims to have kicked violently against the door after he became conscious, and made all the noise he could. The state offered evidence of witnesses who had made experiments by kicking at the door in the vault, and the testimony of other witnesses in the sheriff's office and other parts of the courthouse who had clearly heard all sounds made in the vault during the test. This evidence was held properly admitted.

Emerson v. Chicago City Railroad Co., 203 Ill. App. 412, was an action to recover damages for injuries sustained while alighting from a streetcar. It was held that a witness was properly permitted to testify that immediately after the accident he put his heel on the step of the car to see if it would catch on the plate, as plaintiff claimed her injury had been caused, and that it did.

Kirschwing v. Farrar, 166 Pac. 2d 154, 114 Colo. 421, was an action by a police officer for reinstatement after his discharge for intoxication. Plaintiff had been found unconscious in the street and was taken to a hospital. A blood alcohol test was taken which disclosed "alcohol 3.9 mg. per cc. of blood" which is considered sufficient in most humans to induce a high state of intoxication.

Plaintiff claimed that he was not drunk, but was suffering from an epileptic seizure of the grand mal type. The evidence was held properly admitted.

Cobianchi v. People, 141, Pac. 2d 688, 111 Colo. 298, was an appeal from a conviction of murder by abortion. The defendant objected to the admission of testimony regarding certain tests, which testimony was offered to prove deceased had been pregnant.

The witness testified that deceased had presented him with what he assumed was a sample of her urine. The sample was delivered to Dr. Halley to make the Friedman Modification of the Zondek-Ascheim Test. This is done by injecting a quantity of the urine of the woman suspected of pregnancy into the blood stream of a virgin female rabbit that has been kept away from the proximity of a male rabbit and which is from 4 to 17 weeks old and weighs about 4 pounds. Forty-eight hours after injection the rabbit is killed and its ovaries examined. If the woman is pregnant, certain changes in the appearance of the rabbit's ovaries occur. If the woman is not pregnant, no change is produced. This test was made and Dr. Halley's report was that the result was positive. According to medical testimony the test is 90 per cent accurate. The court held that the admission of this testimony was not error, but the case was reversed on other grounds.

Chicago Cosmetic Co. v. City of Chicago, 29 N.E. 2d 495, 374 Ill. 384, was an action to restrain the defendant from enforcing the chemical or paint factories ordinance of the City of Chicago. Plaintiffs contended that no inflammable substances were used in the manufacture of *their* cosmetics and thus the enforcement of the ordinance as to them would be a denial of due process of law.

The head of the city chemical laboratory testified that his department had tested many types of cosmetic and toilet preparations, and that some of them contained inflammable substances which create fire hazards. He gave the boiling and flash points of many of the substances used in the manufacture of cosmetics. Ether was first, with a flash point of −40°F. and a boiling point of 35°C; acetone was second, with a flash point of 2°F. and a boiling point of 57°C., and alcohol was next in the order of inflammability, with a flash point of 48°F. and a boiling point of 78.6°C. It was held this evidence was properly admitted.

Norris Bros. v. Mattinson, 145 S.W. 2d 204, (Texas, 1940) was an action for personal injuries in which plaintiff had been struck by defendant's automobile. The evidence showed that plaintiff was attempting to catch a waiting bus. He let two cars go by and saw another 400 feet away to his left. He started to cross and was struck by this car after he had gone about 15 feet from the curb. Eye witnesses testified that it was approximately 4½ seconds from the time plaintiff left the curb until he was hit. Plaintiff offered testimony of an expert as to tests made with a stop watch. The expert testified that a car traveling 20 miles per hour would require 13 2/5 seconds to cover the distance from where defendant's car was when plaintiff started to cross the street to the point of the accident; and that 10 seconds would be required to cover the same distance at 30 miles per hour. Even though there was no allegation that defendant had been traveling at a rate of speed in violation of law, this evidence was held admissible.

Simpson v. American Oil Co., 14 S. E. 2d 638, 219 N. Carolina 595, was an action for injuries sustained from the alleged poisonous effect of an insecticide under the trade name of "Amox", the ingredients of which were not revealed at trial. Dr. Bolus, an expert on skin diseases, was permitted to testify regarding a test made on five nurses and interns, which showed that "Amox" had noxious qualities poisonous to humans, and that the manifestations on the nurses and interns were the same as on the plaintiff, except in degree. This evidence was admissible.

In Re: *Copland*, 33 N.E. 2d 853 (Ohio, 1936) was an action for injuries received by plaintiff when struck by defendant's taxi cab. A mechanic in defendant's employ was permited to testify that a general check of the car was made on the afternoon before the accident, and that the headlights, as determined from tests in the shop, would throw a light in the darkness ahead a distance of about 175 feet. This evidence was admitted to contest plaintiff's claim that defendant's lights illuminated only about six feet ahead of the car.

Torgeson v. Missouri, Kansas, Texas Railroad Co., 262 Pac. 564, was an action for damages sustained in a railroad crossing casualty alleged to have been caused by the negligence of defendant railroad. Plaintiff's witness testified as to the results of tests made after the accident to determine the interval of time necessarily consumed by a traveler in getting over the railroad track by each of the three methods open to him: 1. Merely stopping to look; 2. Stopping and going to the track to look; 3. Stopping and going to the point of farthest view, 35 feet on the other side, to look. The witness testified that the tests tended to prove that the safest way to cross was for the traveler to slow his car down practically to a stop at a point on the south side of the track when the front of his car was about seven feet from the south rail and, if he could not then see or hear a train approaching, for him to put on his power and hasten across the track. This evidence was held to be admissible.

Tassin v. New Orleans Public Service, 139 So. 695, was an action by a father to recover for injuries to his son who was run over by defendant's streetcar. Defense was that the boy was sleeping by the track in the shadow of a traffic signal box and that his presence was not noticeable. Shortly after the accident tests were made to determine the extent of visibility of one lying in the shadows. The district judge was present at one of the tests and later admitted testimony that it was extremely difficult to discover the presence of a person lying where the boy had been.

Guinan v. Famous Players-Lasky Corporation, 167 N.E. 235, 267 Mass. 501, was an action to recover for personal injuries received as a result of the ignition and alleged explosion of a quantity of scrap motion picture film. The film was being delivered to a brush manufacturer by one of his employees as scrap film is used to make cement for brushes. The employee boarded a streetcar with the film in a burlap bag, which he placed in the rear of the car on the floor. Underneath the floor and covered by a metal shield was a heater. After a few moments the bag burst into flames causing the injury to the plaintiff.

Defendant objected to the admission of evidence of tests conducted after the accident whereby pieces of film were subjected to various degrees of heat, to contact with electric sparks, and to burning, to ascertain its inflammable character. Small pieces of film were pulverized, inserted in a cartridge and fired from a revolver to determine the explosive qualities of the film.

The court held that the admission of such evidence was warranted due to the importance of the question in this particular case, and because duplication of the explosion in a streetcar was not practical.

Siegel v. Detroit Cab Company, 225 N. W. 601, 246 Mich. 620, was an action for the death of a pedestrian struck by a taxi cab. Testimony of taxi cab drivers as to tests made by them with similar cars, that the cars could be stopped within two feet on a dry pavement when being driven at 12 miles per hour if the brakes were in good condition, was properly admitted.

Clark v. Lawrence Baking Company, 215 N.W. 337, 240 Mich. 352, was an action for wrongful death. The court admitted testimony as to pre-trial experiments in matching the pieces of glass found on the highway at the scene of the accident into the remaining glass in the left rim of the lights on defendant's truck. This was held to be proper.

James v. Baley, Reynolds, Chandelier Company, 30 S.W. 2d 118, 325 Mo. 1054, was an action for wrongful death of plaintiff's husband caused by defendants alleged negligent maintenance of the premises and allowing natural gas to accumulate in a space under the sidewalk. One of the issues was whether the gas had escaped from a fixture belonging to the chandelier company or from a broken main controlled by the gas company. The gas company contended that since there was no rust on the pipe which was located in a damp area, the break had occurred after the explosion. To combat this the chandelier company offered the testimony of experts as to tests conducted in which gas was allowed to flow over freshly broken pipe surfaces for more than one year, and that the pipes were placed in jars with water so that moisture would get on the break, and wet soil would be adjacent to the break, in the same way that the soil in the street had been next to the broken main. The testimony was that no oxidation had taken place on the areas of the break due to the flow of gas. It was held that this evidence was properly admitted.

St. Paul Fire and Marine Insurance Co. v. B. & O. Railroad Company, 195 N.E. 861, 129 Ohio State 401, was an action in which it was alleged that the fire in question had been caused by sparks escaping from defendant's locomotive No. 1332. A mechanical engineer, qualifying as an expert, was allowed to testify to the results of the following experiment: Locomotive No. 1332 was placed at the engineer's disposal for purposes of the test. He staked off a considerable area parallel with the center line of the railroad's right of way and opposite the burned premises. Starting on a line 15 feet from the center of the track he placed alternate and parallel rows of pans containing paraffin, and boxes covered with cotton fleece gauze with the fleecy side up. The train was run past the areas under varying conditions — three times coasting and twice "pulling." After each test an examination was made of the pans of paraffin and the box of cotton fleece gauze. From the coasting tests no material of any kind was found in the pans or on the gauze. From the "pulling" tests the pans were found to contain a "fine, dusty, flakey" material, but no cinders.

Chatman v. Maine Central Railroad, 167 Atl. 559 (New Hamp., 1933) was an action against an employer for injuries caused by alleged negligence in the maintenance of machinery. Plaintiff employee was injured while operating a machine commonly called a "buzz planer", in defendant's car shop. The accident happened when a piece of plank which he was planing suddenly "kicked back" and caused his left hand to come in contact with the revolving knives of the machine. An expert testified that a planer of this type should be installed so as to run at a speed of 4,000 revolutions per minute, and that this was the minimum speed for the safe operation of the machine, that when the speed dropped to approximately 2,000 revolutions per minute the knife would not cut but strikes the wood and throws it backwards in the direction from which it came.

Tests of the planer made a year and one-half after the accident indicated that it was speeded to only 2,850 revolutions per minute. This evidence was admitted.

Wray v. Fairfield Amusement Company, 10 Atl. 2d 600, 126 Conn. 221, was an action for injuries sustained by a passenger on a roller coaster operated by defendant. The defendant's witnesses testified that if a hat were placed on the seat of a car, it would remain unmoved on the seat throughout the entire ride, and that air pressure tends to hold passengers against the back of the seat, and that on a down grade a passenger is thrown not forward, but back.

In rebuttal plaintiff offered the testimony of a witness as to tests conducted to determine in which way force exerts itself when a car on such a railway goes down a dip. The trial court would not allow this testimony and such refusal was held to be error.

Pool v. Day, 53 Pac. 2d 912, 143 Kans. 226, was an action to recover for personal injuries suffered in an automobile accident. Plaintiff introduced evidence of tests showing the distance at which an automobile could be stopped when traveling at certain rates of speed. The car used in the experiment was newer and of a different make than the one involved in the accident, and it also had brakes with a greater braking surface. Nevertheless, this evidence was admitted.

McPeters v. Loomis, 77 Atl. 2d 427, 125 Conn. 526, was an action for wrongful

death of a boy who was found crushed under one of defendant telephone company's poles, which had been left on the ground prior to being set up. When left, one end of the pole was in a ditch—when the boy was found, the pole lay flat in the ditch, the boy underneath it. Defendant's witness was allowed to testify that a pole in the position this one had been before the accident could not have rolled without the intervention of a third party. This testimony was based on an experiment conducted after the death. The evidence was admissible.

Charles v. Texas Co., 18 S. E. 2d 719, 199 So. Carolina 156, gave rise to a problem of whether impure gasoline had been sold by the defendant. Plaintiff had acquired samples of this gasoline which he kept in rubber sealed jars for approximately two years, at which time they were analyzed by a chemist. The chemist was allowed to testify to the contents of the jars of gasoline, which he found to contain a mixture of kerosene in varying amounts. This evidence was held admissible because it was shown by the expert that there would be little or no change in the contents of the jars due to the seals of rubber.

Air Reduction Corp. v. Philadelphia Storage Battery Co., 14 F. 2d 734 (Circuit Court of Appeals, Third Circuit, 1926) was an action by the battery company for damages due to the destruction of its factory by fire caused by the alleged negligence of the defendant. Defendant had contracted to supply the plaintiff with all the oxygen gas it would need, and in doing so delivered the gas in tanks, the contents of which were distributed to the factory by means of defendant's steel manifold. During such operation the manifold exploded, and fire ensued.

A professor of chemical engineering at Massachusetts Institute of Technology testified for the plaintiff as to the results of experiments he had made in subjecting steel manifolds to the effects of oxygen gas suddenly admitted under high pressure into the manifold. This witness had reproduced defendant's manifold and an offer was made to perform an experiment before the jury. An objection to this offer was sustained. However, evidence of the prior test was admitted.

Capital Traction Co. v. Lyon, 24 F. 2d 262 (District of Columbia, 1928) was a personal injury action in which testimony of a doctor as to the results of a *hemoglobin* test made of plaintiff's blood after he was taken to emergency hospital was held admissible, in view of previous testimony that plaintiff's color before the accident was ruddy, and after the accident he was pale.

Lobel v. American Air Lines, 205 F. 2d 927, was an action by a passenger on defendant's airline for injuries sustained in a crash. Plaintiff sought to prove certain acts of negligence in the maintenance and operation of the plane. The defense was allowed to introduce evidence of the results of an experiment conducted by defendant's pilots, showing the effects of a piece of paper in a valve in the fuel line.

Erickson's Dairy Products Co. v. North West Baker Ice Machine Co., 109 Pac. 2d 53, was an action for damages resulting from a fire allegedly caused by negligence of the defendants in failing to use sheets of asbestos to protect a wall while using a welding torch. The inside of the wall in question had four layers of Firtex in it. An expert witness for the defendant testified concerning an experiment in welding a half-inch standard iron pipe at his plant. The witness stated that the pipe was sawed in two and pushed through some Firtex. In making a weld of this pipe the witness testified that no protective substance was used and that the man holding the end of the pipe did not use gloves for protection. The conclusion was that a wall of this material could not catch fire. The court held that the admission of this evidence was proper.

In *McCarthy v. Curry*, 134 N.E. 339, 240 Mass. 442, a witness called by the plaintiff testified that it was impossible to place one's hand past a magneto gear of a car like defendant's while the engine was running. The plaintiff, an automobile mechanic, had brought this personal injury action against the defendant for negligently starting the engine of his auto while the plaintiff was making repairs. The defendant was allowed to introduce evidence of an experiment to show that it was possible to insert one's hand into the motor while it was running, and to feel the springs without coming in contact with the gear. The experiment was made on the same car the plaintiff was working on when hurt. The court held the admission of this evidence was proper.

Garza v. San Antonio Transit Co., 180 S.W. 2d 1006 (Texas, 1944), was an action by a passenger for injuries sustained when a bus door closed on her hand when she was about to board the bus. The defense was allowed to show an experiment by a female witness showing that she, aided by other employees of the defendant, had experimented with the doors by having the operator of the bus close the doors on her hands and attempt to start the bus forward. The experiment was held proper to show the bus would not operate when the doors were not closed.

Baker v. Walston, 141 S.W. 2d 409, was a mother's action against the sheriff for the death of her son who suffocated while imprisoned in the county jail. The accident was caused by a burning mattress outside of the cell in which he was locked. The defense was allowed to show an experiment demonstrating that two men from the inside of the cell, with the use of buckets and running water, which was in the cell the night the decedent lost his life, extinguished a mattress set on fire outside of the cell similar to the one which burned on the night in question. The court held that the admission of testimony of this experiment was proper.

In *Smith's Administratrix v. Middlesboro Electric Company,* 174 S.W. 773, 164 Kentucky 46, plaintiff was killed by an electric shock, at a time when he was using an electric light, in the drug-store where he worked. An expert witness for the defense testified that he made a test seven months after the accident on the transformer from which the secondary wire passed that furnished light for the building in which decedent came to his death. There had been no changes made since the death of decedent. The experiment was made to determine whether there was any defect in the transformer and whether it was working properly. The methods adopted and the results of the test were reduced to writing. The tests showed that the transformer was not defective. The court held admission of this experiment proper as the testimony showed the transformer was in the same condition that it was at the time of the decedent's death and it was brought out that when a transformer is broken down it never rights itself by its own action or that of the electric current but has to be taken down and repaired.

In *Falso v. Puli-New England Theatres,* 17 A. 2d 5, 127 Conn. 367, the plaintiff sustained injuries by falling on the stairway of defendant's theatre. The court permitted a lighting engineer to testify as to the strength of the lights on this stairway as found by an experiment made with a photometer prior to the trial. The experiment showed the stairs were inadequately lighted. The court held that the admission of this testimony into evidence was proper.

In *Lindsey v. Rogers,* 220 S.W. 2d 937, plaintiff testified that the lights of his car were on at the time of the accident. He also testified that the accident was on a dark clear night. Plaintiff's witnesses were permitted to relate that on a dark clear night, in the same month of the year, but a year later, an automobile of the same make and model was driven toward the intersection with its lights on and the witness stated how far the lights could be seen by him as he stood in the intersection.

Griggs v. Kansas City Railway Company, 228 S.W. 508, was an action for the death of the plaintiff's intestate, who was struck while lying in a drunken state on defendant's street car track at night. The main problem was whether defendant's motorman could have stopped his car in time to avoid killing the decedent. Plaintiff performed an experiment where a dummy in the form of a man was placed upon the track in the same position in which the evidence showed decedent was lying when first discovered by the motorman. A witness was placed in the front of a car and testified that he could discover and identify the dummy at a distance of 252 feet. The surrounding conditions were almost exactly the same as they were the night of the accident. The appellate court held the admission of this experiment was proper.

Briggs v. United Fruit and Produce Company, 119 Pac. 2d 687, 11 Wash. 2d 466, was a personal injury action for damages caused by defendant's truck striking the bicycle that plaintiff was riding. Plaintiff introduced into evidence the results of a test taken shortly before the trial by a police officer. The officer testified that under the high beam of lights from an ordinary automobile, the reflector of plaintiff's bicycle could be seen from a distance of some 400 feet, and under the downbeam it was visible at 200 feet. The court

felt this evidence was proper, as the circumstances surrounding the accident were similar.

An interesting experiment is shown in *American Products Co. v. Villwock,* 109 Pac. 2d 570, 7 Wash. 2d 246. In this case a collision was caused by the plaintiff crossing the center line of the highway to avoid hitting a girl on a bicycle, and then being struck by the defendant's truck coming in the opposite direction. Defendants were allowed to introduce into evidence the results of an experiment demonstrating that the girl on the bicycle, on the night of the accident was visible at a greater distance than that testified to by the plaintiff. In this experiment a girl mounted a bicycle and, while holding an egg in her hand, proceeded down the road in the vicinity of the curve where the accident occurred. Two other witnesses followed in an automobile some considerable distance in the rear. They also had a supply of eggs. When the automobile reached a point from which the girl on the bicycle ahead could be seen, the driver would sound the horn, at which time the girl and the other witness would drop an egg. The distance between the eggs was then measured, and the experiment showed that when the bright lights of the automobile were used the distance between eggs was 225 feet, and when the dim lights were used the distance was 175 feet. The court held the admission of this testimony into evidence proper.

In *Leonard v. Hendersen,* 99 Atl. 2d 698, there was a collision in which plaintiff's automobile, while attempting to pass defendant's school bus on the left side, sideswiped the bus and collided with a tree. The defense was allowed to introduce experimental evidence to determine visibility of the defendant school bus driver through his rear view mirror at the time of the accident. Witnesses placed the defendant's bus near to the location it was in when plaintiff started to cross into the left hand lane on the day of the accident. The rear view mirror was also adjusted to the same position it was in at the time of the accident. One witness observed the view of a person in the driver's seat through the mirror. Another witness made measurements to a car behind which was driven by a third witness, and was placed on the same side of the highway about 300 feet behind the bus at a point where it first came into view as the defendant looked into his mirror. An expert witness for defendant then sketched and scaled on an exhibit the location of the bus and the car so spotted. The admission of this experiment into evidence was held proper.

Another example of an experiment of this nature is found in *Ortega v. Pac-Greyhound Lines,* 20 Cal. App. 2d 596, 67 Pac. 2d 702. In this case the deceased plaintiff was killed by defendant's stage while the plaintiff was riding a bicycle. The deputy sheriff testified that in an experiment, a bicycle with a reflector similar to the one on the bicycle of the deceased could be seen for a distance of more than 200 feet, which was the statutory distance required for these reflectors. Testimony of this experiment was held admissible.

An example of an experiment used for impeachment purposes is found in *Hall v. Hannibal Quincy Truck Line,* 211 S.W. 2d 723, in which the plaintiff's car collided with a tractor used by the defendant in parking one of its trailers on a highway. The plaintiff contended that he did not see this trailer until he was 150 feet from the trailer. To rebut this contention the defense performed an experiment in which a witness testified as to how far the lights of a car would reveal an object on Highway 61 while driving eastwardly towards the point of collision. The witness testified he could see objects 700 feet away. The court sustained the admission of this evidence by the trial court and held there was no abuse of discretion since the evidence showed there was no material difference in the circumstances.

In *Crecelius v. Campbell Skokmo,* 13 N.W. 2d 627, one issue was whether the plaintiff ran out from behind a parked automobile so close in front of defendant truck driver that there was no possibility of avoiding the accident. Plaintiff was permitted to introduce into evidence the results of an experiment made 2½ years after the accident in question. Brakes of a Chevrolet pick-up truck similar to the one involved in the accident were adjusted so that the pressure on the wheels was the same as that on the defendant's truck at the time of the accident. The truck was then driven to the scene of the accident where a police officer made some experiments. The purpose was to show in what distance a truck could be stopped at different speeds. This evidence was held to be proper.

Enghlin v. Pittsburgh Railway Co. 36 Pac. 2d 32, the court admitted testimony regarding an experiment performed by the defendant some time after the accident relative to the maximum speed obtainable by the streetcar in question in approaching an intersection. Plaintiff introduced evidence to show that the streetcar in approaching the intersection was traveling at the rate of 30 to 35 miles per hour. To refute this defendant offered evidence of a test made with the identical car, under similar conditions, which showed that the maximum speed the car could attain at the identical place was from 19 to 21 miles per hour. The court held that this testimony was proper.

Hackman v. Beckwith, 64 N.W. 2d 275 involved a collision involving two trucks. Plaintiff's witnesses were permitted to testify about an experiment they made with a tractor trailer outfit similar to the one driven by the decedent. The witness stated that starting with the left wheels on the center line of the highway, it required 75 feet to bring it sufficiently to the right so it would be lined against the curb on that side, as was decedent's vehicle after the collision. There were no eye witnesses to this accident, so the court held the admission of this experiment proper to show the distance it would take the driver to stop his vehicle.

In *Richardson v. Missouri-K-T Railway Co. of Texas,* 205 S.W. 2d 819, the plaintiff was injured while operating a machine in the defendant's planing mill. The defense was allowed to introduce a moving picture, taken 9 months after the accident, showing a foreman at the shop demonstrating how plaintiff's hand could be caught and run through the blades of the machine. The experiment was introduced to sustain the defense's contention that the plaintiff was negligent in placing his hand in front of the machine, and also that plaintiff was negligent in operating the machine. The appellate court held there was no abuse of discretion in the admission of this motion picture into evidence.

Experiments Made Out of Court Where Evidence Thereof Was Excluded

Lincoln Taxi Company v. Rice, 251 S.W. 2d 867 (Kentucky), involved an intersection collision between two automobiles. Each driver claimed the green light was in his favor and that the other "ran" the red light. One driver told police officers that while at the intersection immediately to the east of the collision he had stopped for a red light approximately two car lengths back of the intersection, there being two cars in front of him; that when the light changed he put his car in motion and accelerated up to twenty or twenty-five miles per hour, and when he reached the intersection where the collision occurred the light was green in his favor.

The police officers took their car to the easterly intersection, placed it at a point two or three lengths back of the intersection, and when the light changed to green they started their car in motion and gradualy accelerated up to twenty-five miles per hour. When they reached a point some sixty feet east of the intersection where the collision occurred the light at that intersection changed from red to green. The experiment was repeated with the same result. The appellate court held that the admission of the experimental evidence was improper.

Reber v. Hanson, 51 S.W. 2d 505, 260 Wis. 632, was an action for wrongful death of a twenty month old child who was run over by the wheel of a milk truck. The truck driver testified that he started his engine, took a last look out of the right door of the cab by leaning over with his foot on the brake and clutch pedals, and saw the boy sitting by the wall reading a book. The wall was slightly behind the truck and about 15 feet to the west of it. The driver started off and his right rear wheel ran over the boy.

Plaintiff's witness testified that after the accident, he sat in the same type of truck, at the same place, and went through the exact same motions as described by Hanson. He reported that he could not even see the wall where the boy had allegedly sat. This evidence was held to be improper and unreliable.

Chambers v. Silver, 230 Pac. 2d 146, 103 Cal. App. 2d 633, was a personal injury action resulting from a head-on collision between two automobiles. Defendant's excuse for being on the wrong side of the highway was that his front wheel had hit a raised clay patch which broke a leaf in the spring of his 1936 Ford and veered the car to the left and so affected the steering mechanism that, by reason of such mechanical defect, it was impossible

to steer or control the automobile. Plaintiff offered evidence of a test made with a 1938 Ford which was driven a week before the trial with the left front shackle of the spring unfastened. During the test the driver would run the front right wheel over a two-by-four and then repeat with the left front wheel, and that steering the car was still possible. This testimony was not admitted.

Doss v. Rader, 46 S. E. 2d 434, (Virginia, 1948), was a personal injury action involving the collision of automobiles at the intersection of primary and secondary highways. One of the questions in issue was whether the defendant was keeping a proper lookout as he awaited his turn into the primary highway. Defendant had testified that he had not heard the noise of the plaintiff's approaching car.

On the day before trial, two years after the collision, tests were made whereby plaintiff's car was driven at the same speed and in the same direction on the primary highway, which test showed that the noise of approaching vehicles was plainly audible to a person standing in the intersection at a point where defendant's car had been stopped just prior to the collision. Plaintiff contended that this evidence would show that the defendant was not keeping a proper lookout. The appellate court held that the admission of the evidence was improper and prejudicial.

Bell v. Kenney, 23 S.E. 2d 781, 181 Va. 24, was a wrongful death action which arose from a head-on collision between an automobile and defendant's truck. One of the occupants of the automobile at the time of the collision testified that just before the collision the approaching truck was over the center line of the highway and that its headlights had not been dimmed. This witness had shared the back seat of the automobile with a friend, while the front seat was being occupied by four persons, one of whom sat on the lap of another.

Defendant reenacted the scene by placing four persons in the front seat of an automobile and two persons in the back seat, and offered testimony to show that a person sitting in the back seat was unable to see whether the lights of an approaching truck were dimmed or whether it was traveling on the right or left of the center of the highway. The trial court admitted the evidence, but the appellate court held it to be irrelevant as the similarity had not been established.

Pershing Quicksilver Company v. Theirs, 152 Pac. 2d 432, 62 Nevada 382. Plaintiff was awarded a judgment for an injury from mercurial poisoning alleged to have been contacted as a result of the negligence of his employer in failing to furnish a safe place to work. One year after plaintiff left defendant's employ, defendant conducted a test to determine the mercury content per cubic meter of air in his plant. Evidence of the results of the test was excluded as being too remote to show the mercury content per cubic meter of the air during the period of employment.

Mayer v. Thompson-Hutchison Building Company, 227 So. 859, 116 Ala. 634, was an action for injuries by one who was struck by a brick falling from the cornice of a building alleged to have been improperly constructed. Defendant testified that after the accident one or more persons stood with safety upon a cornice of a building which was shown to have been construced similarly to the one from which the brick fell. On appeal it was held to be error to have admited this testimony.

Decatur Car Wheel and Manufacturing Company v. Mehaffey, 128 Ala. 242, 297 So. 646, was an action for the death of one who was thrown from a hanging scaffold. It was held that the court erred in permitting the plaintiff to introduce evidence of tests made by certain witnesses upon the scaffold two years after the alleged accident, for the purpose of showing to what extent the scaffold could be made to swing or osculate.

Smith v. Stover Manufacturing Company, 205 Ill. App. 169, was an action for injuries sustained by the tipping over of a heavy piece of machinery while being moved across a bridge about ten feet, made of six planks laid end-ways. Plaintiff claimed that the single wheeled dollie upon which the front of the machine was supported bent down the plank on which it rested four to six inches, causing its end to rise and so to strike a wheel of the rear dollie as it reached the end of the bridge. It was held that there was no error in excluding testimony that, while the bridge was in the same condition as on the day of the accident, witness took a machine exactly like the one in question and placed

it on the bridge and took measurements as to the depression caused thereby.

Chicago City Railroad Company, v. Brecher, 112 Ill. App. 106, was an action to recover for the death of plaintiff's decedent, occasioned by the alleged negligence of defendant. It appeared that the deceased was riding on the front footboard of an engine when it came to a crossing of defendant's tracks, where, by reason of the unsafe condition of such tracks at the crossing, the weight of the engine caused them to sink down so that the footboard was caught by some portion of the track and crossing, and was thereby broken, and the deceased was thrown off and killed. It was held error to have admitted evidence of an experiment made on the following day, after the crossing had been filled and tamped, by running the same engine, equipped with a new footboard of the same height as the old one, over the crossing without incident.

Kerby v. Schindell, 136 S.W. 2d 670, 235 Mo. App. 691, was a personal injury action in which plaintiff recovered a verdict for a burn to her arm inflicted while buying meat in defendant's meat market. The burn occurred when her arm came in contact with a hot metal plate on top of defendant's show case.

Defendant's witness was a chemist experienced in making tests for temperature or heat. Defendant offered to show that the witness had tested the place on the day of trial by placing a testing thermometer on the plate, and that after a sufficient length of time it would not register higher than 120 degrees and that 120 degrees would not burn a person. Defendant also offered to have the witness put his hand on the plate and rest it there for a period of time without getting a burn. The appellate court held that exclusion of this evidence was not error and reversed an Order granting defendant a new trial.

Western Sale Bacteria Company v. O'Brien Brothers, 194 Pac. 72, 49 Cal. App. 707, was an action for the purchase price of vetch seed and a certain bacteria preparation known as Westrobac. Defendant set up breach of warranty that the seed when mixed with Westrobac would germinate and promote the growth of trees in defendant's orchard.

Plaintiff took portions of the seed which had been returned by defendant and placed them between moistened blotters and subjected them to a temperature of 98 degrees for a specified length of time. Plaintiff offered to show that as a result of this test a large proportion of the seeds germinated. The court held that refusal to admit this testimony was proper.

Long v. California Western States Life Ins. Co., 271 Pac. 2d 883, 126 Adv. Cal. App. 324, was an action on life policies which was resisted on the grounds that deceased had committed suicide. The deceased had a bullet wound in his forehead and another above the right ear. Plaintiff's theory was that deceased had fallen and had accidentally shot himself in the forehead.

Plaintiff's witness offered to show that by 30 to 45 tests of tripping and falling it had been demonstrated to him that the entrance wound of the bullet would be in the forehead and the exit in the temple. The evidence of this test was not admitted.

Flaherty's Case, 56 N.E. 2d 880, 316 Mass. 719, was an appeal by an employee from an order dismissing his claim for compensation under the workmen's compensation act. The findings were to the effect that the separation of retina of both eyes resulting in blindness was not caused by exposure to naphthalene. The employee had been a longshoreman and on one occasion had unloaded a cargo of crude naphthalene from steamer to freightcar. The court held that the refusal of the hearing officer to consider the results of experiments made with naphthalene on rabbits was not error.

Ruud v. Minn. St. Railroad Co., 279 N.W. 224, 202 Minn. 480, was a proceeding to recover compensation for fatal heat stroke suffered by a motorman while operating the streetcar during extremely hot weather. The court held that the Industrial Accident Commission did not abuse its discretion in refusing to admit evidence of experiments made several months later to determine the amount of heat discharged in the motorman's cab in the course of operation of the car which the deceased had been operating.

Bickley v. Sears Roebuck and Co., 23 N.E. 2d 505, 62 Ohio App. 180, was an action for injuries caused plaintiff when she slipped in defendant store due to the alleged negligence of the defendant in allowing sweeping compound to be on the

floor. The court refused to allow the store manager to testify concerning an experiment he performed the next day by putting some sweeping compound on the floor and trying to slip on it himself.

Housand v. Armour and Co., 175 S.E. 516, 173 So. Carolina 268, was an action for damages for injuries caused as a result of a sale of impure sausage by defendant. Testimony of the results of an analysis of sausage made after six months storage in a refrigerator were excluded on the grounds that chemical changes in the sausage were likely to occur in that length of time.

Klenk v. Klenk, 282 S.W. 153, Missouri 1926, was an action for divorce. One of the factual issues was whether the husband would hold his secretary upon his lap while seated in his office chair. A telephone girl in the office had testified that this was so, and defendant offered testimony of witnesses who conducted an experiment to the effect that one sitting where the telephone girl usually sat could not have seen the husband holding anyone on his lap in his office chair. This evidence was not admitted.

Mutual Life Insurance Co. of Baltimore v. Kelly, 197 N.E. 235, 100 Ind. App. 581, was an action by the beneficiary of a life insurance policy. Defense was that the deceased died of a consequence of his own criminal act (thus violating a policy condition) in that he was shot by a trap gun while in the act of breaking into a cabin. Defendant offered in evidence a pair of pliers purchased by the deceased on the day of death which showed jaw marks like those on the nails found broken off at the screen doors. For purpose of effecting credibility of defendant's witness, plaintiff's witnesses testified as to experiments out of court with two sets of pliers and their effect upon two nails of the same size as those in the door. This evidence was held to be incompetent, and its admission by the trial court was error.

Temple v. DeMirjian, 125 Pac. 2d 544, 51 Cal. App. 2d 559, was an action for wrongful death arising from a head-on collision between two trucks. Defendant set up the defense of unavoidable accident caused by a breaking of the steering mechanism prior to the accident.

Defendant offered the testimony of a witness concerning tests made with a truck of the same make and model as defendant's, in an effort to show that the steering gear could have been dislocated prior to the accident. This witness' tests revealed that when a piece of cement, rock, metal, or other unyielding object was placed between the shackle bolt at the rear of the left front spring and the rear housing of the drag link, and the driver turned the steering wheel to the right, the drag link was forced off the pitman-arm knuckle within a distance of less than forty feet, spreading the housing of the drag link in the same manner as appeared from the inspection of the drag link involved in the accident. This testimony was excluded.

Collins v. Graves, 61 Pac. 2d 1198, 17 Cal. App. 2d 288, was an action for personal injuries arising out of an automobile collision which occurred on a narrow bridge. Defendant testified that he approached the bridge from the south and when he reached the decline leading to the bridge he shut off the power and coasted, and that his speed at such time was 42 miles per hour. He estimated that when he reached the bridge his speed was 25 miles per hour. Plaintiff's witnesses testified that defendant was going approximately 40 miles an hour at this time.

The court excluded testimony as to experiments by defendant's witnesses tending to show how much an automobile would lessen its speed on the incline approaching the narrow bridge from the south, after shutting off the power. The reason given for such exclusion was that climatic conditions, wind pressure, and the automobile were not the same.

People v. Ely, 203 Cal. 628, 265 Pac. 818, was a prosecution for failing to stop and lend aid to one struck by an automobile driven by the defendant. The State's witnesses had testified that the man had been struck by an automobile similar to defendant's, and that on defendant's automobile there were marks on the bumper indicating that they had been made by striking corduroy clothing such as that worn by the man who was struck.

Defendant offered evidence of tests made on dusty bumpers with a piece of corduroy as to what he had found about the impression that would be made upon the bumper by corduroy "when it was pressed lightly or when it was struck a heavy blow." This evidence was not admitted.

In *Glowacki v. A. J. Bayless Markets*, 263 Pac. 2d 799, 76 Arizona 295, Plaintiff

sustained injuries from slipping in defendant's store after stepping in a puddle of water. Plaintiff sought to introduce evidence of an experiment to show the length of time the water had been on the floor at the time of the plaintiff's fall. Two witnesses conducted experiments by pouring water on the concrete floor of plaintiff's home and the plaintiff's attorney's home. This was an effort to see what the reaction of the concrete would be to the water in order to determine how long it would take to form a ring around the contracted perimeter of the water after it was placed upon the floor and especially the length of time it would require to form a ring six inches wide (the size of the ring in defendant's store). The court held the experiment properly excluded since there was not a sufficient showing that the floors were substantially the same.

Lance v. Van Winkle, 213 S.W. 2d 401, was an action for injuries sustained by plaintiff from slipping on an ice cream cone on the steps of the entrance to defendant's store. Plaintiff introduced evidence by an expert chemist to show the length of time it would take an ice cream cone to form a crust. The witness described an experiment in which he placed a half pine of vanilla ice cream on a slab of marble similar to the marble of the step. He spread the ice cream over three square inches, a quarter of an inch thick. He placed it in the sun and at approximately the same temperature as of the day of the accident. It took almost two hours to form a crust. The court held the evidence of this experiment improper because of dissimilar conditions and because there was no showing that the ice cream in the experiment was of the same ingredients.

In *Holyfield v. Joplin Coca-Cola Bottling Company,* 170 S.W. 2d 451, the plaintiff purchased a bottle of Coca-Cola from a distributor and drank part of it and became ill after he discovered a mouse in the bottle. The defense offered testimony concerning the effect of the carcass of a mouse when the same is immersed for a period of 11 minutes in a 2½% solution of caustic soda at a temperature of 120 degrees. The defense contended that for a mouse to get into the bottle at its plant, the mouse would necessarily have been immersed in such a solution for 11 minutes while the bottle was being washed, disinfected, and cleaned. The trial court refused to permit testimony of this experiment because it was not shown that the mouse in question was of the same age and constitutional make-up as the one used in the experiment.

Mintz v. Atlantic Coast Line Railway Company, 236 N.C. 109, 72 S.E. 2d 38, was an action for personal injuries as a result of the plaintiff's slipping and falling on a spiral stairway in the defendant's office building. The defense presented a witness to testify about an experiment made by him and two other men more than 2½ years after the accident to test the stability of the bannister or handrail of the spiral stairway. Tests showed that three men stood on the steps, grasped the handrail in their hands, and pulled on it. The handrail stood the weight of three persons. The trial court excluded this testimony and the appellate court sustained its ruling because the defense failed to show a sufficient similarity in essential conditions on the two occasions.

In *Ballman v. Lueking Painting Co.,* 219 S.W. 603, 281 Mo. 342, one of the issues was whether the truck driven by defendant's employee was the truck that struck the plaintiff. The plaintiff and a witness testified that they could read the words painted on the side of the truck that ran over the plaintiff. Witnesses testified for the plaintiff that an experiment was performed two years after the accident under somewhat similar conditions, and the witnesses were able to read the signs painted on the truck at the time. The appellate court held that the admission of this experiment was error, since conditions were not sufficiently reproduced. The distance of the sign in the experiment from the street was different from that of the defendant's truck, and a canvas was used for the experiment and an automobile rather than a regular truck.

In *Potts v. Bird,* 27 Pac. 2d 745, 93 Colo. 547, plaintiff's deceased husband was driving a car with the entire glass out of the left front door, with a piece of cardboard filling the entire space. The auto was involved in an intersection collision with defendant's car. In order to rebut the defense contention that the cardboard obstructed the decedent's view, the court permitted a witness for the plaintiff to testify concerning an experiment he had made in another car with such a cardboard

window to show that this cardboard would not obstruct the decedent's view. The appellate court held the admission of this experiment prejudicial error, since the experiment was made at a different date under different conditions of the road, at a different rate of speed and in the absence of other traffic. The experiment was also made by a person having different eyes, with different thoughts in mind and made for the express purpose of trying to see through the opening of the cardboard to determine the extent of vision.

In *Piechota v. Rapp*, 27 N.W. 2d 682, 148 Nebr. 460, the plaintiff sought to establish the speed of defendant's car. The plaintiff's witness made an experiment turning the curve where the accident occurred and concluded that the curve could be safely driven at 45 miles per hour. The court in pointing out the dissimilarity between the experiment and the actual accident showed that the witness knew the road, was obviously watching it, and driving the car for the purpose of conducting the experiment. In the actual case the defendant knew the road slightly and was driving under the influence of intoxicating liquors. The court held that the admission of testimony concerning this experiment constituted prejudicial error.

In *Navajo Freight Lines v. Mahaffy*, 174 Fed. 2d 305, the defendant offered testimony with respect to the results of experiments designed to show that a car parked where the plaintiff's car was parked would coast, after some movement causing the car to start, onto the highway where the collision occurred if the emergency brake were released and the car was not in gear. The court rejected this experiment since it was not shown that a similar automobile was used while conducting the experiment, nor was it shown that the climatic conditions and the wind resistance were the same.

PART II

LIABILITY OF A MANUFACTURER OF CHATTELS TO PERSONS OTHER THAN IMMEDIATE PURCHASERS, ON THE THEORY OF WARRANTY.

Under the common law, the manufacturer of chattels was not liable for breach of an implied warranty unless there was privity of contract. This general rule is followed in a majority of states but, like the hearsay rule, it has been riddled with exceptions. The most noted exceptions are found in the matter of foodstuffs where almost all the courts hold the manufacturer liable on breach of warranty that goods are fit for human consumption. Another is as to those articles which are inherently dangerous, such as dynamite. A third exception, followed in many states, is found where the purchaser relied upon representations made by the manufacturer in advertising materials or on labels. These representations are the crux of the warranty regardless of the contractual obligations of the vendor.

Certainly we can safely say the trend in many areas is away from the general rule and this is pointed up in the most recent decisions.

An interesting review of this question is very ably presented by Frederick M. Whiteside, in the *Arkansas Law Review*, Vol 1, No. 2. There the author said:

"At first glance it might be thought that the Uniform Sales Act, by use of the words, 'whether he be grower or manufacturer or not,' changed the law so as to give the consumer a remedy against the manufacturer for breach of the implied warranties even in the absence of privity of contract. Nowhere, however, does the Sales Act provide that the buyer can recover from one other than his immediate seller for a breach of warranty. *** In some states this rule of law has been limited or done away with judicially, sometimes upon a theory likening the ultimate consumer to a third party beneficiary of the contract made by the manufacturer contemplating use of its product by the public, sometimes by working out some direct contractual relationship, and sometimes by holding that the warranty runs with the chattel and binds the manufacturer wherever it goes. No doubt it would be possible theoretically for this to be accomplished by judicial decision. *** It is interesting to note, however, that the present draft of the Uniform Revised Sales Act, not yet in final form, contains

a provision that a warranty extends to 'any natural person whose relationship to the buyer is such as to make it reasonable to expect that such person may use, consume or be affected by the goods.' "

No attempt has been made to develop the history of the decisions on this subject in the various states, but we have examined the latest decisions in each of the highest appellate courts of our 48 states which have ruled on this subject. The following is a brief summary of those cases by reporter area.

ATLANTIC REPORTER AREA

Connecticut—Duart v. Axton-Cross Company, 110 Atl. 2d 647 (1954). In this case the plaintiff was employed by a college in New London as an assistant cook. The plaintiff's immediate superior purchased on behalf of the college a barrel of flaked soap from the defendant retail establishment. The soap was manufactured and assembled by the defendant Axton-Cross Company. The plaintiff sued both defendants for breach of implied warranty of fitness. The Connecticut Court of Common Pleas held that as between the plaintiff and the defendant manufacturer there was no contract express or implied. Therefore the plaintiff could not recover in its suit against the manufacturer notwithstanding any action that may accrue between the plaintiff and the retailer.

Delaware—Barni v. Kutner, 76 Atl. 2d 801, 6 Terry 550 (1950). In this case the plaintiffs brought suit to recover damages for personal injuries and property damages sustained in a collision between autos, one of which was owned by the plaintiffs. The plaintiff husband had obtained his auto about two hours before the accident from the defendant, a dealer in used cars. Defendant represented to the plaintiff husband that the vehicle was "in good condition and fit to be driven on and over the highways." When the accident occurred the plaintiff husband had his wife as a passenger in his car. Suit was brought by both plaintiffs on three counts, one of which was breach of warranty. The court held that the wife of the purchaser of the used automobile could not maintain an action against the dealer for breach of warranty in that the brakes on the automobile were defective resulting in a collision since there was no privity of contract between the parties. The Superior Court of Delaware followed the majority rule that in order to recover for breach of warranty there must be privity of contract between the parties to the suit.

Maine—Pelletier v. DuPont, 128 Atl. 186, 124 Maine 269 (1925). The plaintiff wife had occasion to use considerable quantities of bread to supply needs of family and boarders. She was accustomed to ordering the household supplies chiefly from a certain firm dealing in groceries and provisions, including bread. The defendant was a baker who manufactured or baked loaf bread for domestic consumption. Each loaf of defendant's bread of this brand was, before it left his bakery, wrapped in waxed paper and sealed. There happened to be a pin in one of these loaves. The plaintiff wife swallowed it and sued the manufacturer on the alleged warranty that it was wholesome and fit for human consumption as food and was free from any foreign substances dangerous and harmful to health of those using the bread as food. The supreme court held that generally as to the sales of personal property except as to title, the rule of caveat emptor applies. The manufacturer, except when manufacturing for a specified use, is not liable to a stranger to the contract of the manufacturer for any defect developing in the product, unless known to him and rendering the article dangerous. The court held that there was no implied warranty, there being no privity of contract between the parties.

Maryland—Vaccarino v. Cozzubo, 31 Atl. 2d 316, 181 Md. 614 (1943). Plaintiff sued on contract against the retailer dealer operating a grocery and meat store to recover damages caused by a breach of an alleged implied warranty that certain sausage which was sold by the defendant and eaten by the plaintiff was wholesome and fit for human consumption. Here the court of appeals stated that an implied warranty of wholesomeness of food does not inure to the benefit of any consumers other than the purchaser. Such consumers have no privity of contract with the seller. Therefore, it is apparent in Maryland that there would have to be privity as between the purchaser and manufacturer in order to recover for breach of warranty.

New Hampshire—Smith v. Salem Coca-Cola Bottling Co., Inc., 92 N. H. 97, 25 Atl.

2d 125 (1942). The defendant bottled its product and sold it to an independent dealer. From the latter the plaintiff purchased a bottle, took it home, opened it and was injured when in drinking the contents he swallowed several pieces of glass. He sued the manufacturer in assumpsit for breach of warranty and in case for negligence. The supreme court held that a buyer or consumer of goods for human consumption cannot recover on a theory of breach of warranty as against the manufacturer, producer, or distributor with whom he is not in contractual privity. It can be assumed that the court also would direct the propositions even as in cases of general chattels.

New Jersey—Duncan v. Juman, 96 Atl. 2d 415, 25 N. J. Super. 330 (1952). Parents visited a grocery and delicatessen store conducted by the defendant in quest of food for the family. One of the parents purchased some buns and served one to her minor son. The son, in the process of eating the bun, sustained bodily injuries because of a piece of metal within the bun. The action was brought by the parents and guardians ad litem of their son to recover damages because of a breach of implied warranty of quality and fitness for human consumption. The superior court, appellate division, reiterated the general rule that a warranty is the creature of contract and the liability of a defendant for its breach cannot be asserted by one who was not a privy to the contract.

Pennsylvania—Silverman v. Samuel Mallinger Co., 100 Atl. 2d 715, 375 P. 422 (1953). This was an action in assumpsit for damages for alleged breach of express warranty of glass jars purchased by the plaintiff. The plaintiff bottler ordered glass jars from Mallinger, a dealer or middleman as distinguished from an agent. Mallinger in turn bought the jars from the manufacturer. The manufacturer always looked to the dealer for payment and invoiced him directly. Mallinger in turn invoiced his customers and looked solely to them for payment. The court held that the manufacturer is not liable to the dealer's customer for the commercial loss due to the breach of express or implied warranty from the manufacturer to the dealer unless the representation of quality or fitness for particular use was conveyed or intended to be conveyed by the manufacturer or original vendor to the dealer's customer by catalog, manual, tags affixed to shipment, legend upon container, or by negotiations with dealer's customer. However, in Pennsylvania there is a distinction between general chattels and food and beverages. In *Caskie v. Coca-Cola Battling Co.,* 96 Atl. 2d 901, 373 Pa. 614 (1953), the plaintiff, a policeman, purchased a bottle of Coca-Cola from an enclosed dispensing machine as he was about to report for duty. It seems that the Coca-Cola contained hydrochloric acid and the plaintiff suffered physical damages. This was an action against the manufacturer resulting from breach of implied warranty that the food or beverage was fit for human consumption. The Supreme Court of Pennsylvania held that the plaintiff, although not in privity with the manufacturer, could recover for breach of implied warranty and did not have to rely on the negligence theory.

Rhode Island—Minutilla v. Providence Ice Cream Co., 144 Atl. 884, 50 R. I. 43, (1929). The plaintiff, a restaurant customer, sued the manufacturer of ice cream for injuries sustained from eating ice cream containing small particles of glass. The ice cream was kept in a cooler furnished by the defendant in small parcels, each wrapped in tissue paper. The supreme court held that there could not be any suit against the manufacturer for breach of implied warranty because there was no privity of contract. However the court went on to state that as a general rule the makers of food products who furnishes unwholesome food or drink for public consumption through a retailer may be directly liable to the injured customer who purchases from retailer. However the court did base its holding in those cases upon negligence and not upon any contract.

Vermont — Green Mountain Mushroom Co., Inc. v. Brown et al., 95 Atl. 2d 679 (1953). This was an action by a buyer against the seller-dealer for breach of an implied warranty of fitness of roofing cement used in the construction of the buyer's building. The dealer was engaged in the business of selling building supplies. The supreme court held that where a buyer orders goods to be supplied and trusts to judgment or skill of seller to select goods suitable for the purposes for which they are ordered, there is an implied warranty that goods shall be reasonably fit for that purpose.

NORTHEASTERN REPORTER AREA

Ohio—Jordan v. Brouwer, 93, N.E. 2d 49, 86 Ohio App. 505 (1949), is a pertinent Ohio case on breach of express warranty. Therein the plaintiff purchased an anti-freeze solution for his automobile, the said solution being manufactured by defendant, sold through a dealer and allegedly being the cause of injury to plaintiff's chattel. The court denied recovery due to lack of privity. The case of *Wood v. General Electric Co.,* 112 N.E. 2d 8, 159 Ohio State 273 (1953), treats implied warranty. The action was brought against the manufacturer of an alleged defective and inherently dangerous electric blanket sold to the plaintiff in its original package by a distributor. The court held that regardless of the inherently dangerous character of an article, no recovery could be had unless privity existed between the purchaser and the manufacturer.

Indiana—The liability of a manufacturer to persons other than the immediate purchaser for breach of warranty remains an open question in Indiana as there are no cases deciding the issue.

Illinois—Chanin v. Chevrolet Motor Co., 89 F. 2d 889, C. CA. 7th (1937). The plaintiff brought suit against the manufacturer of the automobile for injuries sustained when a supposedly shatter-proof windshield shattered as a result of a collision. The court held that an action based on warranty is ex contractu in nature and you need privity of contract to recover. The law of Illinois, where food or drugs are concerned, allows recovery regardless of privity.

Massachusetts—Karger v. Armour & Co., 17 F. Supp. 484, D.C. Mass. (1936). The general rule followed in Massachusetts is that implied warranty of fitness, which imposes liability upon the dealer from whom one purchases unwholesome food, does not extend to the manufacturer.

New York—Campo v. Scofield, 95 N.E. 2d 802, 301 N.Y. 468 (1950). In this case plaintiff was injured while using an onion topping machine on his son's farm. The complaint showed that the machine had not been sold directly to the plaintiff. The court denied recovery saying there was no privity of contract between the defendant manufacturer and the plaintiff. An interesting New York case to note is *Perlmutter v. Beth David Hospital,* 308 N.Y. 100 where plaintiff sued the hospital for injury resulting from a faulty blood transfusion. The court denied recovery holding that the transfusion was a service, not a sale.

NORTHWESTERN REPORTER AREA

Michigan—The Michigan courts avoid the issue or warranty and apply rules of neglience in deciding if the ultimate consumer can recover from the manufacturer. The case of *Ebers v. General Chemical Co.,* 310 Mich. 261 (1945), the plaintiff sued for damages to his peach trees which had been allegedly caused by a chemical produced by the defendant and advertised as being a safe and economical destroyer of peach tree borer. The court ruled that the defendant was negligent. In the most recent Michigan case *Keenan v. Goebel Brewing Co.,* 337 Mich. 98 (1953) the court held defendant liable on theory of negligence rather than on breach of warranty, when beer bottle exploded and injured the plaintiff.

Minnesota—Randall et al., v. Goodrich Gamble Co., 54 N.W. 2d 769 (1952). The plaintiff in this case purchased a bottle of liniment from a drugstore. The liniment when applied to plaintiff's ankle resulted in a severe chemical burn requiring hospitalization and surgery. The plaintiff sued the manufacturer on the basis of breach of implied warranty. The court held the warranty reaches to the consumer if it induces the purchase and the usage is consistent with the purpose for which the goods were purchased in reliance on the warranty.

North Dakota—There are no cases on point.

South Dakota—Whitehorn v. Nash Finch, 293 N.W. 859, 67 S.D. 465 (1940). The court in this case followed the line of reasoning that in absence of representation to the public in the form of advertisements, labels or other similar forms, there is no warranty to a subpurchaser upon which to predicate liability. Here was a case of the plaintiff eating contaminated candy and then suing the manufacturer.

Nebraska—Dricksosen v. Black, Sivalls & Bryson, Inc., et al., 64 N.W. 2d 88, 158 Neb. 531 (1954). This case is the most recent pronouncement by the supreme court and although case was based upon

negligence its seems to swing away from the old theory, that lack of privity will defeat recovery. Nebraska seems to hold that the negligence claim is aided by the contractual obligation owed the injured party by the manufacturer of a chattel.

Wisconsin—Cohan v. Associated Fur Farms, Inc., et al., 53 N.W. 2d 788, 261 Wis. 584 (1952). A very interesting case in which the plaintiff sued for loss of mink allegedly resulting from use of mink feed prepared by Associated by mixing pork livers with other ingredients. Armour and Company which sold the pork livers to Associated was interpleaded as a defendant. The demurrer of Armour and Company was sustained on the grounds that for a breach of warranty you need privity of contract between parties and this was lacking. The Wisconsin court followed the general rule of privity as laid down in *Prinson v. Russo,* 215 N.W. 905, 194 Wis. 142 (1927). The general rule has certain exceptions, such as cases where the article is inherently dangerous as explosives, or poisonous. *Coakley v. Prentiss Wabers Stone Co.,* 195 N.W. 388, 182 Wis. 94 (1923).

Iowa—Anderson v. Tyler, et al., 233 Iowa 1033, 274 N.W. 48 (1937). The plaintiff while enjoying a round of golf at the country club, purchased a Coca-Cola and began drinking it. He subsequently discovered a mouse in the bottle and became violently ill requiring medical attention. The court said the manufacturer of foodstuffs impliedly warrants that they are fit for human consumption and the ultimate consumer can sue on this warranty regardless of privity of contract. The warranty runs with the sale.

PACIFIC REPORTER AREA

Montana—No cases on point.

Oregon—No cases on point.

Nevada—No cases on point.

Utah—No cases on point.

New Mexico—No cases on point.

Wyoming—No cases on point.

Arizona—Jordan v. Worthington Pump & Machinery Co., 241 P. 2d 433, 73 Ariz. 329 (1952). In this case the manufacturer sold pumps to a dealer and subsequent purchaser from the dealer sued the manufacturer based upon warranty. The court held that the customer could not recover against the manufacturer. The court did not mention privity of contract but held relationship of dealer and manufacturer was that of seller and buyer not principal and agent.

Kansas—Nichols, et al., v. Nold, et al., 258 P. 2d 317, 174 Kan. 613 (1953). The case presents another example of an exploding Coca-Cola bottle. * * * The court held that each person in the chain of distribution (manufacturer, distributor and retailer) warrant that the goods are fit for human consumption and each one can be sued upon breach of warranty.

Oklahoma—Southwest Ice & Dairy Products Co. v. Faulkenberry, et al., 220 P. 2d (1950). The appellee owned a dairy store in which he sold appellant's milk. A customer purchased milk and upon opening the bottle found a dead mouse. The dealer sued the manufacturer for loss of business and the jury found for the dealer. The court upheld the verdict and said the manufacturer or processor of food products impliedly warrants his goods and such warranty is available to all who may be damaged by their use. The court followed and cited the case of *Griffen, et al., v. Asbury,* 196 Okl. 484, 165 P. 2d 822 (1945), which was a Coca-Cola case.

California—Burr, et al., v. Sherwin-Williams Co., 42 Cal. 2d 682, 268 P. 2d 1041 (1954). This was an action against the manufacturer of insecticide for crop damage allegedly resulting from use of the insecticide. In this case the court said you need privity of contract between ultimate consumer and purchaser. However, the court pointed out many exceptions to this rule in California. One is where foodstuffs are involved. In that instance, regardless of privity, the implied warranty runs from manufacturer to the ultimate consumer. *Klein v. Duchess Sandwich Co., Ltd.,* 14 Cal. 2d 272, 93 P. 2d 799 (1939). Another exception is found in a few cases where the purchaser relied upon representation made by the manufacturer in labels or advertising material. *Free v. Sluss,* 87 Cal. 2d 933, 197 P. 2d 854 (1948).

Colorado—Senter v. B. F. Goodrich Co., 127 F. Supp. 705, U.S. D.C. Colo. (1954). The plaintiff sued the manufacturer of a tubeless tire based upon breach of express warranty by the dealer. The court allowed the car owner to recover against the manufacturer regardless of privity of contract but would not allow a passenger in plaintiff's car to recover.

Idaho—Abercrombie v. Union Portland Cement Co., 205 P. 1118, 35 Ida. 231 (1922). This quite old case is the latest pronouncement by the Idaho Supreme Court. This court follows the general rule and allows no recovery to the ultimate purchaser as against the manufacturer for a breach of warranty.

Washington—Fleenor, et ux, v. Erickson, et al., 215 P. 2d 885 (1950). The Supreme Court of Washington followed the general rule and would not allow the ultimate buyer to recover damages upon breach of warranty from the manufacturer of a refrigeration plant. However, the court recognized many exceptions to this rule, one of which has to do with foodstuffs. *Geisness v. Scow Bay Packing Co., Inc.,* 132 P. 2d 740, 16 Wash. 2d 1 (1942). The court allowed recovery by the consumer for defective salmon against the manufacturer regardless of privity of contract.

SOUTHERN REPORTER AREA

Florida—Florida Coca-Cola Bottling Co. v. Jordan, et al., 62 So. 2d 910 (1953). The consumer had purchased a bottle of Coca-Cola from a retailer and she was injured by swallowing broken glass found in the Coca-Cola. The court held that an ultimate consumer who purchases a bottled soft beverage from a retailer and who is injured by deleterious substances contained therein, may maintain an action directly against the bottler upon the theory of implied warranty. This doctrine seems to be followed in regard to other chattels besides food as evidenced by *Hoskins v. Jackson Grain Co.,* 63 So. 2d 514 (1953). The court, although basing its opinion on negligence, said that suit may be brought against the manufacturer notwithstanding want of privity.

Louisiana—Miller, et ux, v. Louisiana Coca-Cola Bottling Co., Ltd., 70 So. 2d 409 (1954). The plaintiff suffered illness due to the consumption of a portion of the contents of a bottle of Coca-Cola which contained a foreign matter. In allowing the plaintiff to recover, the court said that while there is not a direct contract to this effect between the consuming public and the manufacturer, it is fair to imply that, since the manufacturer, in marketing its products in capped bottles intends them to reach the consumer in the same condition in which they leave the factory, a warranty of wholesomeness exists between it and the consumer. The Federal Court in *Loclede Steel Co. v. Silas Mason Co.,* 67 F. Supp. 751, D.C. W.D. La. (1946)., applied the breach of warranty theory in holding a manufacturer of steel liable to the user notwithstanding the purchase was made through a middleman.

Alabama—Cotton v. John Deere Plow Co., 18 So. 2d 727, 246 Ala. 36 (1944). This action arose due to default on promissory notes payable to an independent dealer by the purchaser (maker). The court says the common rule is well settled that the benefit of a warranty does not run with the chattel on its resale so as to give the sub-purchaser any right of action as against the original seller. This case follows the earlier Alabama case of *Sterchi Bros. Stores, Inc. v. Castleberry,* 182 So. 471, 28 Ala. 36 (1938), which holds that a seller's warranty imposes no liability upon him to third parties who are not in privity.

Mississippi—Biedenharn Candy Co. v. Moore, 186 So. 620, 184 Miss. 720 (1939). The appellee here purchased a bottle of Coca-Cola from a retailer and when she drank part of the beverage discovered a foreign body in the bottle. This caused her to become violently ill. The court said the action on an implied warranty of a bottler of beverage that it is fit for human consumption inures to the ultimate consumer.

SOUTHEASTERN REPORTER AREA

Georgia—Studebaker Corporation v. Nail, 62 S.E. 2d 198, 84 Ga. App. 779 (1950). In this case Mr. Nail purchased a new Studebaker through a dealer and he sued the manufacturer on the grounds of an express warranty for defects in the automobile. The Georgia court held that the manufacturer had given its warranty of fitness to the ultimate purchaser and set out a distinction between implied warranties which the court says can only be imposed between those parties in privity of contract.

South Carolina—No case on point, but see *Mauldin v. Milford,* 121 S.E. 547, 127 S.C. 508 (1924), and *Farr-Barnes Lumber Co. v. Town of St. George,* 122 S.E. 24, 128 S.C. 67 (1924).

North Carolina—Marler v. Pearlman's Salvage Co., 52 S.E. 2d 3, 230 N.C. 121 (1949), or *Ford v. Willys-Overland,* 147

S.E. 822 N.C. 147 (1929), are not on point but incidentally discuss the rule.

Virginia—Colonna v. Rosedale Dairy Co., 186 S.E. 94, 166 Va. 314 (1936). The courts of Virginia follow the common law rule that there is no liability for breach of implied warranty unless there is privity of contract. There is no such privity between a manufacturer and a consumer. In this case the warranty did not inure to the son of a purchaser of milk who became ill due to germs in the milk.

West Virginia—Blevins v. Raleigh Coca-Cola Co., 3 S.E. 2d 627 (1939). The well established rule in West Virginia is that you need privity of contract between parties unless food products are involved, then recovery can be had from the manufacturer. However, most all cases of this nature are based upon negligence as is the case cited wherein plaintiff found a deleterious substance in a bottle of Coca-Cola and was allowed to recover.

SOUTHWESTERN REPORTER AREA

Arkansas—Green v. Equitable Powder Mfg. Co., 94 F. Supp. 126, W.D. Ark., Ft. Smith Div. (1950). This case is one where the plaintiff was injured when a dynamite cap, sold to his employer, exploded. The court applying the law of Arkansas denied recovery saying that the ultimate consumer cannot recover from the manufacturer on breach of warranty but only on theory of negligence. This case followed the old Arkansas case of *Nelson v. Armour Packing Co.*, 90 S.W. 288, 76 Ark. 352 which denied recovery due to lack of privity. The adoption of the Uniform Sales Act did not change Arkansas law on this subject.

Tennessee—Cantrell v. Burnett Henderson Co., et al., 216 S.W. 2d 307 (1948) is a case wherein a purchaser of an automobile which was destroyed by fire, three or four days afterward, sued the dealer and the manufacturer. The purchaser claimed the car had defective wiring. The court held that the suit could not be maintained against the manufacturer because of lack of privity of contract.

Kentucky—North American Fertilizer Co v. Combs, et al., 212 S.W. 2d 526, 307 Ky. 869 (1948). This rather unusual and interesting case involved the use of fertilizer by the plaintiff who purchased through an independent merchandiser. The product was composed of six parts nitrogen, 8 parts phosphoric acid and 6 parts potash and was sold for ordinary use as a fertilizer. The plaintiffs used the compound for a special purpose as bed fertilizer and then sued the manufacturer on basis of breach of warranty. The court denied recovery saying there was no privity between the manufacturer and the ultimate consumer. It seems Kentucky would reach a different result in regard to foodstuffs.

Texas—Coca-Cola Bottling Co. of Fort Worth v. Burgess, 195 S.W. 2d 379 (1946). We have in this case the old story of a foreign body being found in goods sold for human consumption. The consumer sued the manufacturer and the Texas court held that he could recover on the basis of breach of warranty and that he would not have to prove any negligence by the manufacturer. Note the case of *Bowman Biscuit Co. of Texas v. Hines*, 251 S.W. 2d 153 (1952) for an excellent discussion of this subject, although the case was on wholesaler's liability.

Missouri—Worley v. Procter and Gamble Mfg. Co., 253 S.W. 2d 532 (1952). In this case the court said that action by an ultimate consumer, who incurred a skin infection from manufacturer's detergent, would not fail for lack of privity between the parties. The court held that representations directed to the ultimate consumer by manufacturer is the crux of the warranty regardless of contractual obligations of the vendor.

Respectfully submitted,

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Report of Fire and Inland Marine Committee—1955

JAMES D. FELLERS, *Chairman*
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THE primary mission undertaken by the committee at its meeting in White Sulphur Springs on July 7, 1954, was an inventory and review of the activities of the Fire and Inland Marine Committee during recent years in an effort to determine what might be done in order to stimulate greater interest in fire insurance subjects. A complete index of the former reports of the committee and of articles and publications dealing with fire and marine subjects in the Yearbooks (1928-33) and the Journals (1934-54) appears in the Index to Insurance Counsel Journal (pgs. 59-60; 98-99) which was published as a supplement to the April, 1955 Journal. The reports and proceedings of the Insurance Section of the American Bar Association were also studied.

The committee concluded that the apparent lethargy within the association on fire insurance subjects was understandable in the light of the fact that the industry has, in the last ten years, eliminated from its policy forms most of the provisions which made it possible to defend successfully an occasional one of the ½ of 1% of fire insurance cases which were actually tried in court.

Nevertheless, the committee considered that it has an important role in the work of the association and that it should continue to promote a better understanding of the problems in this field through open forums, published articles and research of outstanding decisions involving fire and inland marine insurance law. Inasmuch as it appeared that the convention program this year could not be given to some particular subject in this field, attention was concentrated on the development of outstanding articles worthy of consideration for publication in the Journal.

One of the suggested topics was, "What Makes Out a *Prima Facie* Case in a Law Action Involving a Mercantile Loss Where the Policy Contains No Record Keeping Warranty or Requirement?" The concensus of the committee, however, was that it would be a rare day when any company would permit itself to be taken into court on such a question and that we should endeavor to develop topics of more general interest, particularly those which might involve possible litigation in view of the type of practice handled by most of the members of the association.

It was recognized that there are many important questions confronting insurance counsel today growing out of the new comprehensive type of insurance policies that have developed with Multiple Line Underwriting. One topic which was considered to be worth exploring is the requirements which the courts have set up for a valid oral contract. This matter has been the subject of a fair amount of litigation resulting in apparent differences between the Federal rule and the majority state rule. Another subject recommended has been the legal meaning of an "explosion" as used in fire insurance policies. There have been a number of interesting cases, each one of which seems to broaden the coverage a little beyond its predecessors, and many should welcome a clarification in the light of the most recent cases.

Through the committee's efforts arrangements were made for the publication of an interesting and instructive article by L. B. Bogart, Secretary, Aetna Insurance Group, on "In Trust and Commission Clause—Liability or Asset?" which appears in the April, 1955 issue of the Journal (Vol. XXII, page 146).

A major achievement of the year has been the collection and collation of fire insurance cases which have been decided during the period July, 1954 to April, 1955, which project has been undertaken under the leadership of Vice-Chairman Peter J. Korsan, Secretary and Counsel of the Fire Association of Philadelphia. In addition to the study of the current fire insurance cases, a review has been undertaken of all of the cases that have cited or followed *Dubin Paper Co. v. Insurance Co. of North America,* 1949, Pa., 63 A. 2d 85, and also *Farber v. Perkiomen Mut. Ins. Co.,* 1952, Pa., 88 A. 2d 776, which latter case has neither been followed nor cited since it was handed down but which merits occasional review. Both of these decisions are referred to in the Annotation of the 1943

New York Standard Fire Insurance Policy published by the Insurance Law Section of the American Bar Association in 1953, and are considered as very significant cases in this field.

The digest of authorities also includes reference to the case of *Vogel v. Northern Assurance Co., Ltd.*, 114 F. Supp. 591, 219 F. 2d 409, 8 F. & C. C. 592, which yielded a startling result under the current New York Standard Form Policy. The committee has recently noted the April 19, 1955, decision of the Supreme Court of South Carolina in *Hunt v. General Insurance Company of America*, 87 S. E. 2d 34, requiring overpayment in a valued policy situation.

The current annotations of these reported decisions are attached to the Report of the Committee as an appendix with the hope that this digest will be of value to those interested in this field.

Respectfully submitted,

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Annotations—Fire Insurance Cases

Period Covered: July 1954 to April 1955

At first glance the reader will see that the following cases cover a variety of subheadings under the title of fire insurance, but they have been grouped together topically to afford unanimity of subject matter where possible. The topical identification has been inserted for the reader's ease as the complete factual situation of every case cited has not been set forth. The topical identifications are deemed to be self-explanatory so nothing further is given on that point. In like manner, due to the variety of topics covered as well as variety of jurisdictions cited no rules are expounded as resulting from a given set of cases.

Reformation—Mutual Mistake

Bankers Fire Ins. Co. v. Henderson et al., 8 F. & C.C. 451, 83 S.E. 2d 424 (Nov. 1954) Virginia.

An innocent omission by the agent of a material stipulation contrary to the intent of the parties resulting in a mutual mistake is sufficient to allow the assured a reformation of the policy after a loss thereon, to conform to the actual intent.

Facts:

Bankers Fire had 3 policies on buildings and equipment of insured's cleaning and pressing establishment:

1. On 2-story brick building with metal roof at 1218-1220 Church St.
2. On specific items of equipment while located in 1-story galvanized iron building at 1220½ Church St.
3. On contents of 1st Floor in 2-story brick building at 1218-1220 Church St.

Improvements consisted of 2 units: a 2-story building fronting on Church St. with cinder block extension in rear and to rear of this extension and separated by a 6-ft alley, a 1-story galvanized iron building.

Issue was whether it was intent of parties that the policy covering the 2-story building at 1218-1220 also covered galvanized iron building destroyed by fire and whether policy covering contents on 1st Floor at 1218-1220 covered contents in galvanized iron building.

Insureds contend that galvanized iron building is a "unit in its plant"; that it was so considered by them and agent of company at time policies were written and that through inadvertence or mistake of agent the description of property covered was not broad enough to cover this building and contents.

Company contends that iron building was a separate building requiring higher rate and neither it nor contents were intended to be included.

Mason, the agent, had written insurance

on these premises for these owners for 20 years and was familiar with premises; however, during last 10 years his nephew had actually written the policies and handled the business; the policy was actually not seen by insureds since it went directly to Trustee bank to whom loss was payable; a letter was introduced at the trial evidencing that Mason knew that the policies were intended to cover all property owned by insured; however, he and his nephew denied that they had intended to cover all such property.

Law:

The court found that the evidence warranted the reformation of the policies to conform to the intent of the parties.

Basically the rule is that reformation is granted (1) where there has been an innocent omission or insertion of a material stipulation, contrary to the intent of the parties, and *under a mutual mistake;* or (2) where there has been a mistake of one party accompanied by fraud or other inequitable conduct of the remaining parties.

The court rules out No. 2 as applying here since no evidence of fraud was found. The court seemed to have difficulty in finding *mutuality of mistake.* It said: "A mistake of an agent concurred in by an insured is a mutual one affording a basis for reformation." Citing another case, "The principle that mistake of one party alone, not a mutual or common mistake, will not be corrected by reformation, cannot prevent relief in this instance, for the mistake was a common one within the meaning of that rule. It is not meant by it that the error in drafting by an agent of one party cannot be relieved. Insurance policies are always drafted by agents of the company, but that fact does not interfere with correction of mistakes in drafting . . . . "

"It is well settled that the negligent failure of a party to know or discover the facts, as to which both parties are under a mistake does not preclude rescission or reformation on account thereof."

As I see it the lesson to be learned from this case is that while the contract should speak for itself on the theory that it represents the agreement reduced to writing, the parole evidence rule that oral evidence will not be permitted to vary the terms of a written agreement, has many exceptions and we must be on the lookout for them. In my opinion this case should never have reached the courts and it was an expensive lesson for the company. If the written contract contains material errors the insured may be entitled to reformation.

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Automobile Ins. Co. of Hartford et al., Appellants v. United Electric Service Co., et al., Appellees, 8 F. & C. C. 580, Texas Court of Civil Appeals, February 11, 1955.

The plaintiffs brought suit against the defendant insurers to reform certain policies and to recover the full amount of a loss sustained by fire on the basis of evidence that revealed that the defendant agents had inadvertently included 80% co-insurance clauses in plaintiff's policies of fire insurance when orders were given to increase the amount of coverage of the policies. Reformation was allowed and full recovery granted on the grounds of mutual mistake when the clauses were inadvertently inserted in the policies.

• • • •

Indemnity Ins. Co. of North America v. Town of Milford, 127 F. Supp. 394, N. S. D. C. Connecticut, March 31, 1954, affirmed 218 F. 2d 602.

Where an insurer wishes to obtain reformation of a policy it has issued to exclude volunteer firemen from coverage, it must show by clear and convincing evidence that such an exclusion was intended by both parties to the contract and was omitted by mutual mistake.

Appraisal Clause

Delmar Box Co., Inc., v. Aetna Insurance Company et al., 137 N.Y.S. 491, Feb. 3, 1955.

The policies in question all contained the standard appraisal clause as required by section 168 of the Insurance Law of the State of New York. Prior to the institution of this suit, the petitioner had demanded that the appellant companies comply with the provisions of this clause. The companies refused on the ground that the policies were void. (At the time of this case, this question was pending in the State Supreme Court.) The appraisal provisions here do not constitute enforceable agreements to arbitrate controversies arising thereunder. The determination of a fire loss is not an arbitration proceeding.

Arbitration

In the Matter of Delmar Box Co., Inc. 8 F. & C.C. 597, New York Supreme Court, February 3, 1955.

Clauses with reference to appraisal in fire insurance policies do not constitute enforceable agreements to arbitrate controversies thereunder.

• • • •

The United Boat Service Corp., v. The Fulton Fire Ins. Co., 137 N.Y.S. 670, Jan. 28, 1955.

The plaintiff suffered a loss covered under an insurance policy issued by the defendant. An appraisal was held according to the terms of the policy and the defendant now claims that that is the limit of its liability. The court held that the appraisal proceeding was not an arbitration and if the appraisers made a determination of liability, they exceeded the powers conferred upon them. Therefore, in an action to determine liability, an appraisal is not a sufficient defense thereto.

Exclusion and Restricting Clauses

Farmer, et al., v. London & Lancashire Ins. Co. Ltd., et al., 8 F. & C. C. 601; Kansas City Court of Appeals, January 11, 1955.

The Plaintiff had fire insurance on various structures but coverage was not afforded where the structures were used in whole or in part for mercantile, manufacturing or farming purposes. The plaintiff after he had sold out a bottling business some four years before the fire, used the barn as a storage place for certain syrup manufacturing equipment. The barn was used for the sole purpose of storage and had not been used in the plaintiff's present business and therefore the exclusion clause was not applicable here.

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Barker v. Iowa Mutual Ins. Co., North Carolina Supreme Court, January 14, 1955, 8 F. & C. C. 560.

Plaintiff brought an action on a fire insurance policy to recover the value of certain personality destroyed. The evidence disclosed that plaintiff insured paid rent and furnished an apartment for his son who was away from home attending college. There was a fire in the apartment and this property of the insured was destroyed. The lower court allowed plaintiff a recovery under a provision of the policy which provided: "The insured may apply up to ten per cent of the amount specified ... to cover property described ... belonging to the insured or any member of the family of and residing with, the insured, while elsewhere than on the described premises . . . ." On appeal this court held that the minor dependent son retained his residence with his father despite the fact that he was away at college. The loss was therefore within the coverage of the policy. The judgment for plaintiff was affirmed.

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Isadore v. Washington Fire & Marine Ins. Co., 8 F. & C. C. 494, 75 So. 2d 217, Oct. 1954.

Where the insurer issued a policy covering two dwellings, both of which were subsequently damaged by fire, the insurer cannot limit its liability to but one of the dwellings on the grounds that it issued an endorsement to the policy restricting coverage to the front building only and specifically excluding from coverage the rear building since the assured was not consulted regarding the endorsement restricting coverage and the insurer was unable to prove that a policy containing the endorsement was ever mailed to the assured or that the assured had ever given his consent to the modification.

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Owen v. Milwaukee Ins. Co. of Milwaukee, Wisconsin, 8 F. & C. C. 595, Indiana Appellate Court, January 24, 1955.

The plaintiff had a fire policy covering household and personal property on certain described premises. While the policy was in force the plaintiff inadvertently threw her denture into a trash fire on the premises. The court held that the loss was attributable to a friendly fire and thus not covered under the policy.

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Frings v. Farm Bureau Mutual Fire Ins. Co., 8 F. & C. C. 598, Ohio Court of Appeals, February 28, 1955.

Plaintiff brought an action to recover for a fire loss resulting from damage to the dwelling and furnace. A defective thermostatic control on a stoker of the furnace caused the furnace to overheat and melt the walls of the fire box permitting the flames to escape and set fire to the plaintiff's dwelling. The court held that the destruction of both the dwelling and furnace were attributable to a hostile fire and that the insurer was liable for the loss.

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Farmers Fire Ins. Co. v. Farris, 8 F. & C. C. 608, Arkansas Supreme Court, March 7, 1955.

A fire insurance policy was issued to cover a dwelling and barn and included in the policy was a provision excluding liability in the event of vacancy or unoccupancy for a period of 10 days. The facts of the situation were that the plaintiff's tenant, while he slept and ate elsewhere, visited the premises at least once a day, kept cattle in the pasture and furnishings in the dwelling and had intentions of moving into the premises when conditions became such that he could operate his sawmill profitably there. The court held that the question of vacancy or unoccupancy was one of fact for the jury to find from the evidence.

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Boon v. Arkansas Farmers Mutual Fire Ins. Co., 8 F. & C. C. 622, Arkansas Supreme Court, February 14, 1955.

After an agreement of sale was entered into and before time for settlement, the prospective purchaser procured fire insurance on the property to be sold. The sale fell through and the vendor released the purchaser from the contract. The farm was unoccupied sometime in the early part of May and on June 19th the property was destroyed by fire. The vendor's carrier paid him for the loss and brought an action as subrogee against the purchaser's carrier for contribution. The court held that the policy was not avoided by the vacancy and unoccupancy clause for a period of 60 days had not lapsed and that defendant could not cancel the policy by returning the premium to the purchaser for it knew of the vendor by way of a mortgagee clause attached to the policy which required 10 days' notice for cancellation. Verdict was directed for plaintiff.

Bailee's Liability

Old Colony Insurance Company v. Lambert, 129 F. Supp. 545, March 18, 1955, U. S. Dist. Ct., N. J.

Where named insured was bailee in possession of goods insured under fire policy at time they were destroyed by fire, bailors, who were customers of named insured and who had delivered the goods to named insured for processing, would be entitled to proceeds of fire policy.

Assignment of Insurance Proceeds

Travelers Fire Ins. Co., et al., v. Steinmann, 8. F. & C. C. 655, Texas Court of Civil Appeals, March 4, 1955.

Plaintiff was co-owner of a building with the defendant's insured. The co-owners had an agreement that in the event of a loss by fire any insurance collected would belong one-half to each. The insured building was totally destroyed by fire and the defendant paid their insured one-half of the policy proceeds when it was learned he was one-half owner of the property. The plaintiff brought suit for the other one-half of the insurance proceeds. The court held that since the plaintiff was a stranger to the insurance contract he could not bring a direct action on the policy and collect thereunder.

Garnishment Proceedings

Capitol Fixture & Supply Co. v. National Fire Ins. of Hartford, 8 F. & C. C. 585, Colorado Supreme Court, January 24, 1955.

An insured's garnisher is in the same position as the insured as regards the garnisher attempting to hold the insurer liable on a judgment it recovered against the named insured when the insured has failed to comply with the terms of the insurance contract. The insured's failure to comply with the terms of the contract precluded an action by the garnisher of the insured against the insurance company.

Increase of Hazard

Pearl Assurance Company, Ltd. v. Southern Wood Products Co., 8 F. & C. C. 490, U. S. Circuit Court (5th Circuit), Oct. 22, 1954.

Where assured converted a building from a warehouse and office building into a plywood manufacturing plant, held: The fire insurance policy on the building was not invalidated by reason of the assured increasing the hazard since from the evidence it appeared that the hazard had been materially reduced.

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Pearl Assurance Company, Ltd. v. Southern Wood Products Co., 8 F. & C. C. 507, Dec. 2, 1954, U. S. Court of Appeals for the Fifth Circuit (on rehearing).

An insurer could not successfully contend that placing a mortgage on the insured property increased the "moral hazard" of a fire in the absence of a condition in the policy against encumbrances; and evidence of indebtedness was properly excluded where the insurer's answer plead only that putting machinery in the insured building increased the hazard of fire.

Parol Evidence Rule

Rocky Mountain Fuel Co., et al., v. Providence Washington Ins. Co., et al., 8 F. & C. C. 484, Nov. 1, 1954.

Admissibility of parol evidence where the insurer issued a fire policy in the amount of $12,500 (being $2,500 building and $10,000 contents) with an endorsement attached reading "Note: The occupancy of all buildings shown on the form is amended to read 'Machinery Warehouse' with the exception of Item No. 8" and the insured had three policies issued by different companies and all the policies read the same, held; that a reasonable interpretation of the endorsement as contended by plaintiff, that it was placed thereon because of an understanding that the equipment would be insured wherever located and that the equipment was moved from one building on the schedule on request to redistribute the risk more evenly between the insured buildings, was improperly denied and therefore the judgment was reversed and remanded with directions to permit plaintiffs to offer evidence in accordance with the offers made and that such evidence would not be violative of the parol evidence rule because the endorsement interpretation was ambiguous otherwise.

Oral Insurance

The Home Insurance Co. v. Thurmond Tanner, 220 F. 2d 41, March 11, 1955, U. S. Court of Appeals (5th Circuit), 8 F. & C. C. 616.

The insured claimed that before he suffered his loss he had an oral agreement with the insurer to increase his then existing fire insurance policy from $10,500 to $25,000 and that as the fire loss was in excess of the $10,500 amount, he brought suit for the excess amount. The court held that under Georgia law an insurance contract, to be enforceable, must be in writing and since no valid endorsement to the policy was issued, there was no valid enforceable insurance by parol for the excess over the $10,500 limit.

Proof of Loss

Heirty v. North River Ins. Co., 8 F. & C. C. 522, December 10, 1954.

Where the insurer, during negotiations with the assured after a loss was sustained, remained silent and failed to object to the claimed absence of proofs of loss in a form required by it, the insurer cannot later be heard to say that the assured failed to comply with the provisions of the policy.

State Statutes

Southland County Mutual Ins. Co. v. Denson, 8 F. & C. C. 636, Texas Court of Civil Appeals, April 5, 1955.

The insured suffered a total loss of his property by fire. The fire policy was in the amount of $4,000. An applicable statute provides that in the event of a total loss by fire, the amount of the policy shall be held to be a liquidated demand on the company for the full amount of the policy. The company could have rendered the statute inapplicable by adopting proper by-laws but it did not do this and its failure precluded it from cross-examining the claimant's witnesses to determine the reasonable cash value and thereby lessen its loss.

Valued Policy Law

Nathan v. St. Paul Mutual Ins. Co., Minnesota Supreme Court, January 21, 1955, 8 F. & C. C. 564.

Plaintiff brought action against her insurer to recover on a "valued" fire insurance policy. The evidence revealed that plaintiff obtained a "valued" policy from defendant insuring her premises for $12,000. Plaintiff represented that she was sole owner of the property, that the premises were in good condition, and that there were no liens against it. Defendant insurer failed to make an inspection of the property and at trial successfully contended that plaintiff had committed intentional misrepresentations which increased the risk of loss. On appeal this court held that the Minnesota "valued policy" law precluded defendant from introducing evidence on the condition of the premises which existed before or at the time plaintiff applied for the policy. Statute clearly required that defendant had the burden of inspecting the premises before the issuance of a policy, and evidence that did not concern change after the issuance of the policy was inadmissible. The lower court also erroneously instructed that plaintiff in order to prevail must prove that she was the purchaser of the property, since all plaintiff had to prove to establish an insurable interest was that she would suffer a loss by the destruction of the building. The failure to disclose the existence of a mechanic's lien of $200 did not increase the risk of a fire because of plaintiff's decreased pecuniary in-

terest in the property. The judgment for defendant was reversed and a new trial granted.

Valuation of Damages

Cotton Belt Ins. Co., Inc. v. A. Campolern & Co., Inc., 8 F. & C. C. 527, December 29, 1954, U. S. Circuit Court of Appeals (Fifth Circuit).

In an action to recover on an oral contract of fire insurance on cotton, the damages should have been determined by establishing the market value of the cotton at the time and place of the loss and in the absence of proof that there was no market value, proof of what the assured paid for the cotton was inadmissible.

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Lambert v. St. Paul Fire & Marine Ins. Co. 8 F. & C. C. 461; 272 P. 2d 1110, July 1954.

Under a fire insurance policy to cover wheat "to the extent of the actual cash value at the time of the loss . . . . " the plaintiff is entitled to recovery based upon the market value of the wheat at the time of its destruction less costs of transportation but not based upon the amount the government would have loaned him on the wheat at a price prescribed by the Commodity Credit Corporation.

Fraud

Bethesda Salvage Co., Inc. & David Deckelbaum, v. Fireman's Fund Ins. Co. et al., 111 A. 2d 472, Dist. of Col., February 1, 1955.

Appellant through its president David Deckelbaum made claims to the appellees for a fire loss and upon the oral representations and sworn proofs of loss submitted by the president the appellees made payment up to the total amount of their policies. The appellant claimed that the fire destroyed 300 tons of paper whereas the building where the loss occurred was shown to have been incapable of holding more than 129 tons of paper. This evidence was sufficient to show fraud on the part of the appellant and its excess recovery ($2,912) over its actual loss was ordered returned to the appellees. Mr. Deckelbaum, being president of the appellant corporation and owning half of its stock and being the one who made the fraudulent claims, created personal and individual liability on his own part by his actions.

Waiver of Policy Provisions

House, et al., v. Billman Security Ins. Co. Appellant, 8 F. & C.C. 469, 60 N.W. 2d 213, Oct. 1954.

An agent has no authority to orally change the express written provisions of a policy and thereby increase the risk of coverage to an amount in excess of the stated 10% away from premises when the policy covers household furnishings.

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Continental Ins. Co. v. Thrash, 8 F. & C.C. 588, Mississippi Supreme Court, March 7, 1955.

When the insurance company's agent issued the policies in question here, she was aware that the insured did not keep his books and records in an iron safe as was required by the policies. Therefore, when a loss by fire occurred, the insurers could not defend on the basis of a violation of that clause for such was deemed to be waived by the agent's action.

Subrogation

Cerny-Pickas & Company, et al., v. C. R. John Co., 123 N. E. 2d 858 (Illinois), December 15, 1954.

A lessor and his insurance company as subrogee can maintain an action against the lessee for damage done to the property by fire under the lease which provided that the lessee would yield premises, at termination of lease, to lessor in good condition and repair except for loss by fire and ordinary wear and that lessee would keep improvements on the premises in good repair, except for injury by fire or other causes beyond lessee's control, and comply with all applicable regulations, laws and ordinances, did not bar recovery by lessor for loss of or injury to the property because of fire, as the lease did not expressly or impliedly exempt lessee from liability for negligence or violation of positive duties imposed by city ordinance.

Vendor-Vendee Relationship—Insurable Interest

Dubon Paper Co. v. Insurance Co. of North America, 1949 Pa., 63 A. 2d 85.

Insured had agreed to sell a building for less than its sound insurable value. Purchaser discovered that seller had insured it for less than this value and so bought additional and separate insurance in his own name, but was not made an

additional insured or loss payee under the policies of the seller.

The property was damaged by fire before the transaction was completed, but the sale was consummated despite this. The insurance written in the name of the purchaser was paid to him without question, but the companies insuring the seller contested their liability to the purchaser, because he was not an insured or loss payee. The purchaser then brought an action in equity against the insurers and the estate of the seller (who had died after the sale). The court ordered the proceeds paid to the estate of the seller and ordered the estate to hold these funds as trustee for the purchaser.

The court furthermore decided that Perkin's insurable interest was not limited to the balance of the purchase price but covered the whole of the property and decided that the fact that Perkins received the balance of the price does not relieve the insurer.

The "Dubin" case has been followed once and cited 10 times since it was decided by the Supreme Court of Pennsylvania on January 10, 1949.

In *Spires v. Hanover Fire Ins. Co.* 70 A. 2d 828, decided January 16, 1950, the Pennsylvania Supreme Court held that the landlord had no interest in the insurance since he was not named as an insured or loss payee. Here an airport containing a hangar was leased with an agreement that tenant might build additional hangars which would remain tenant's property and be removed at termination. The tenant agreed to keep both existing and future buildings insured at her expense. Property was insured in name of tenant only, the form including a specific amount of insurance on the hangars owned by the landlord. The insured did not file proof of loss for the hangars and settled for damage to his property only. The court implied that possibly the same result as that obtained in the Dubin case could have been reached in the Spires case had the action been brought in equity rather than at law.

Heidisch, et ux. v. Globe & Republic Ins. Co. of America, 368 Pa. 602, 84 A. 2d 566, decided by Supreme Court of Pennsylvania, November 13, 1951, involved a suit to recover on a fire policy for destruction by fire of building on plaintiff's property which had been condemned by eminent domain, but title to which had not yet passed to condemnor at time of fire.

The plaintiffs (the insureds) were awarded the value of the property in the condemnation action. Title remained in plaintiffs until the amount awarded was actually paid. In the meantime the Globe issued the policy and before payment of the award the building insured was destroyed. Subsequently, the county (pursuant to consent decree in the condemnation action) paid the award in full.

The Company argued that the plaintiffs had mere paper title to secure payment of the award and not such title as constitutes an insurable interest; further that plaintiffs suffered no economic loss and cannot recover for that reason.

Referring to the Dubin case the court said that the person possessed of legal title has an insurable interest; that the holder of legal title was a trustee of funds received for purchaser or equitable owner; defendant may not set up equitable ownership in another as a defense.

On the question that the amount of the award was not affected by the fire and that the County gained by the fire since it saved money by not having to raze the building the court said the Dubin case supplied the complete answer. "The loss the company contracts to remedy is the fire-created depletion of the insured's assets and that is made up not by the erection of a duplicate of the building destroyed but by paying the insured *its value in money*. This liability the insuring companies cannot escape by anything any third party may later do for the insured's benefit."

In *Wood v. Evaritzky, et ux.,* 369 Pa. 123, 85 A. 2d 24, decided by the Supreme Court of Pennsylvania on December 27, 1951, the Dubin case was cited as authority for the principle that "where an agreement is made for the sale of an estate, the vendor is considered as a trustee for the purchaser of the estate sold, and the purchaser as a trustee of the purchase money for the vendor."

Again in *Allardice v. McCain,* 375 Pa. 528, 101 A. 2d 385, decided by the Supreme Court of Pennsylvania on November 24, 1953, the Dubin case was cited as authority for the proposition that "When a contract is made for the sale of land, equity considers the vendee as the purchaser of the estate sold, and the purchaser as a trustee for the vendor for the purchase money. So much is the vendee considered in con-

templation of equity, as actually seized of the estate, that he must bear any loss which may happen to the estate between the agreement and the conveyance; and he will be entitled to any benefit which may accrue to it in the interval; because, by the contract, he is the owner of the premises to every intent and purpose, in equity."

In *Allcorn, et al., v. Commonwealth Mut. Fire Ins. Co. of Pa.*, 174 Pa. Super. 489, 102 A. 2d 179, the Superior Court of Pennsylvania on January 19, 1954 cited the Dubin case as approving the principle that if verdict in favor of bailees on semi-trailer theft policy was more than they were entitled to as against interest of bailor, liability of insurer to bailees for total amount of verdict was not affected thereby, but bailees would be regarded as holding all over and above their own interest in trust for bailor.

American Home Fire Assurance Co. of New York v. Mid-west Enterprise Co. decided by U. S. Court of Appeals May 21, 1951, 189 F. 2d 528, cited the Dubin case as authority for the proposition that a contract between the building owner and lessee under which owner was to remodel building did not reduce owner's insurable interest in building where no alterations had been made at the time of fire.

Vogel, et al., v. Northern Assurance Co., decided by the U. S. District Court, September 8, 1953, 114 F. Supp. 592, involved a situation where owner of realty and prospective purchaser executed an agreement of sale and each protected their interest by placing fire insurance on the property. Fire destroyed the property before the deed was delivered to purchasers. The owner subsequently delivered the deed to purchasers and transferred to them his claim under the fire insurance he had placed on the property.

Referring to the *Heidisch* case (previously referred to) the court said that there seemed no doubt that under the law of Pennsylvania when a fire damages a property after an agreement of sale has been entered into and before delivery of the deed, the fire insurance company of the seller is liable to seller for loss up to limit of policy even though he may have been paid in full by the purchaser. Since seller assigned his claim to purchasers it is clear that they can recover the full amount of seller's insurance.

The court went on to say that even if seller had not assigned his claim to purchasers it appears that purchaser could collect full amount of seller's insurance by filing an action in equity asking insurance company to pay insurance money to seller and that seller be declared a trustee for purchaser on the authority of the Dubin case.

New England Gas & Elec. Assn. et al., v. Ocean Accident & Guarantee Corp. decided May 7, 1953 by Supreme Judicial Court of Mass., 116 N.E. 2d 671. Cited Dubin case for proposition that the fact that purchaser paid for a parcel of real estate after house thereon was damaged by fire and the same price he agreed to pay before the fire did not diminish the liability of the insurer to pay for the value of property destroyed or damaged.

The case of *Herr v. Underwriters at Lloyd's, London,* decided by U. S. District Court in Alaska May 8, 1951, also cited the Dubin case on the basis of permitting insured to recover face value of policy.

All of these cases emphasize that trouble and uncertainty could have been avoided had the purchaser insisted that he be added as an insured or loss payee under the policies of the seller.

Vogel, et al., v. Northern Assurance Co., Ltd., et al., 8 F. & C. C. 592, C.C.A. 3d, February 17, 1955, 219 F. 2d 409.

An owner of real estate and a prospective buyer entered into a contract for the sale of the property. Each protected his interest by securing fire insurance from the defendants. Before a conveyance of the property, it was destroyed by fire. The plaintiff purchaser completed the contract and took an assignment of the seller's claim against the insurance company. The court held that the plaintiff had an action for damages from both insurance companies and granted him a judgment in the amount of $15,000 which was $3,000 more than the stipulated loss. This decision was based upon the reasoning of a case decided in 1853 when it was determined that the seller could recover fully against the insurance carrier for a loss occurring between the time of the agreement and final settlement even though the buyer has taken title according to the terms of contract.

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Hunt, et al., v. General Ins. Co. of America,

8 F. & C. C. 633, South Carolina Supreme Court, April 19, 1955.

An owner of property granted a life estate to her grandchildren for the length of the grantor's life. The grantor retained a remainder interest in the property. The grantees insured their interest in the amount of $8,000 while the grantor insured her interest in the amount of $3,000. A fire occurred resulting in damage in the amount of $1,290. In a suit by the grantor on her policy, she recovered a judgment in the amount of $922, the value of her reversionary interest. The court held that the plaintiffs, grantees, here were entitled to full recovery in the amount of the loss by fire and that the Valued Policy Statute provisions regarding pro-rating were not applicable since the defendant had issued the two policies with knowledge of plaintiff's interest in the policy and also that the court was estopped to deny liability for the full amount of the loss where it accepted the risk and received premium with full knowledge that the amount named in the policy grossly overinsured plaintiff's interest.

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Walters v. Century Lloyds Ins. Co., 8 F. & C. C. 508, 267 S.W. 2d 268, Nov. 1954.

A conveyance of property upon trust, the settlor retaining the beneficial interest, did not constitute a change of ownership since such a change is merely nominal when it is not of a nature calculated to increase the motive to burn.

Where the assured was an uneducated woman and unversed in business affairs and the insurer's agent (adjuster) was in possession of an inventory submitted by the assured which was complete in every respect and different only from a formal proof of loss in that it was not signed and sworn to, a factual question is raised as to whether or not the insurer waived the proof of loss requirement.

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Bowen, et al., v. Aetna Ins. Co., 8 F. & C.C. 457, Sept. 20, 1954, U. S. District Court for the Northern District of Georgia, Atlantic Division.

Where plaintiff has constructed a building at his own expense on property which was in his wife's name but purchased with joint funds; held that plaintiff had an insurable interest in the building because he would have benefited by its preservation.

Germania Mutual Aid Assn. v. Schaefer, 8 F. & C.C. 587, Texas Court of Civil Appeals, January 14, 1955.

Occupancy by a proposed purchase under an oral executory contract of sale was not such a change of title interest or possession as would void a fire insurance policy under a clause pertaining to change of title, interest or possession. Plaintiff vendor still retained title, interest and possession of the property since he was not obligated to make a conveyance under the unenforceable oral contract of sale.

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Thomas Brewer v. North River Ins. Co., et al., 137 N.Y.S. 2d 909.

Where owner of property conveyed same after one of two fire policies covering property had been issued, but insured thereafter had a mortgage on the property, he had an insurable interest to the extent of his mortgage and each insurer was liable in such proportion as amount of its coverage bore to total insurance.

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Washington Assurance Co. v. Duncan, 140 N.Y.S. 2d 119, April 11, 1955.

Where owner-insured conveyed the property and took back a purchase-money mortgage he retained an insurable interest sufficient to effectuate the continuance of the fire policy even though the policy contained a clause suspending or restricting insurance "while hazard is increased by any means within the control or knowledge of the insured". The right of subrogation under a fire policy does not accrue until payment of a loss has been made.

Depreciation

Distinguished from the notoriety achieved by the Dubin case is a case that was very probably equally important—decided by the Pennsylvania Supreme Court on May 26, 1952. Perhaps it would be well if it were to lapse into oblivion but the fact remains that it stands on the books, unreversed, and the companies would do well to review it occasionally since it could be thrown in our teeth again every time the question of depreciation on partial losses arises.

Reference is to the Farber Case, *Farber v. Perkiomen Mut. Ins. Co.*, 88 A. 2d 776, May 26, 1952. In determining the amount due an insured for a partial loss under a co-insurance clause attached to the policy,

the reproduction cost new of the restoration is not depreciated by the percentage of depreciation applicable to the building as a whole in determining its actual cash value immediately prior to the fire. Thus, where an insured carried $10,000 coverage on a building actually worth $15,774.34 at the time of fire, full recovery under the policies was allowed although the partial loss was computed to be only about 40 per cent of total. The anomalous situation produced was that the insured recovered the face amount of his policies for a partial loss and still retained 56 per cent of the value of his property, whereas, if he had had a total loss, he would likewise have recovered only $10,000 and would have had no portion of his building remaining.

Report of Marine Insurance Committee—1955

WALTER HUMKEY, *Chairman*
Miami, Florida

AT the time the personnel was assigned to this committee it was uniformly recognized that there was a serious development in the law which was quite disturbing to the Marine Industry and in the field of underwriting maritime liability. The committee undertook as its objective a study of the developments in the law of the relationship between the steamship owners and operators and stevedores and the cleavage of liability between them. One of our members, Mr. Ben Yancey of New Orleans, wrote a very comprehensive and enlightening article on this subject, which was published in the Mid-Winter issue of the Journal dated January, 1955, Volume XXII No. 1, Page 95.

The substance of the article, as we interpret it, was to the effect that by decision the federal courts had moved into the legislative branch of the government to the degree of extending to stevedores and other marine shore workers the warranty of seaworthiness; even in cases where independent contracting stevedore outfits and other types of business, brought their equipment aboard vessels. In such cases, the equipment for all practical purposes, was considered to be that of the vessel and the vessel was liable for any defects resulting in injury to stevedores or other marine shore workers who might come aboard the vessel. In such cases, stevedores and other comparable workers have double remedy. The first being the benefits derived from the Longshoreman–Harbor Workers Act. Secondly, the right of recovery from a third party, to-wit: the shipowner for negligence and unseaworthiness. The courts have held that in such cases there is no remedy over or right of recovery against the independent contractor who brought the defective equipment aboard the vessel. These decisions have created economical and commercial dilemma and have resulted in a pattern of law that will compel shipowners to resort to the use of indemnifying contracts which will unquestionably prove burdensome and expensive by way of insurance which will carry substantial deductible features and high premiums.

The committee had hoped to prepare a second article on this subject, but has not done so for the reason that there is now pending in the United States Supreme Court a very important case which could possibly result in a decision which would straighten out or correct the decisions which are considered to be fallacious. The Supreme Court, granted Certiorari in this important case from the Second Circuit, *Palazzola v. Pan Atlantic Steamship Corporation*, 211 F. 2d 277, 1954 AMC 766, and after argument sustained the decision of the court of appeals. Petition for Rehearing was granted and the Supreme Court has receded from the decision of affirmance and has ordered reargument of the case. Until there is a final decision in this case, the committee feels that there should not be any more said or done about this subject. In view of the status of the law and the uncertainty brought about by the Supreme Court's action in the Palazzola case, the committee feels that no recommendations should be made. It may be that some action should be taken to bring about a reform of the law on the subject which would result in protection to the shipowners that was enjoyed prior

to the *Seas Shipping Company, Inc. v. Sieracki* case, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, 1946 AMC 698.

Report of Workmen's Compensation Committee—1955

L. J. CAREY, *Chairman*
Detroit, Michigan

THIS report of your committee is divided into several segments with the idea in mind of bringing to the attention of the membership specific subjects which are of vital interest in the field of workmen's compensation today. In some instances, a report on a certain subject may be nothing more than an attempt to bring you up-to-date while in another segment of the report you may find material of very special interest on a subject you have heard casually discussed as being vital to the insurance industry.

The chairman of the committee extends special credit to Mr. Warren Tucker of the committee and to Mr. Joseph Craugh of Utica, New York, Mr. Ashley St. Clair of Boston, Massachusetts, and Mr. Floyd Frazier of Chicago, who, although not members of our committee, willingly and voluntarily furnished material for its preparation.

NEW WORKMEN'S COMPENSATION AND EMPLOYERS LIABILITY POLICY

It is significant that in the field of workmen's compensation uniformity is and has been present to a greater extent than in most of the other lines of casualty insurance. Thirty-five years ago the old compensation policy was drafted and became known as the Standard Workmen's Compensation and Employers Liability Policy. Compensation laws to which it applied have changed and have been broadened, new problems developed, but the language of the policy remained unchanged except by endorsement. However, these changes required such a volume of endorsements that many policies carried five or more endorsements and occasionally there would be one with more than a hundred.

It was not until 1949 that the National Council on Compensation Insurance, working in cooperation with workmen's compensation bureaus, began work on the preparation of a new policy form. Its Manual and Policy Forms Committees worked diligently before final completion. The new policy form has now been approved and since October 1, 1954 it has been in use in all of the states of the country in which private insurers operate (except Arizona) and the District of Columbia, Alaska and Hawaii.

The objectives of the drafters of this new policy were not only to eliminate the cumbersome endorsements but to enlarge and clarify the policy coverage as well.

We do not wish to convey the idea that the endorsement problem has been solved and that hereafter an insured or his attorney will have but one instrument to review. State laws in several states require that certain specific language, written in a designated type, must appear in the policy. Until such statutes have been amended and until certain changes are made in the manuals in use in individual states, there will continue to be a necessity for some endorsements.

The new policy gives the employer as nearly as possible complete protection against liability to his employees because of work injuries. It now covers the liability of the employer for work injuries and disease and applies to all operations in the state or states designated and while engaged in operations necessary or incidental to the operations in such states. Where the injury is one not covered under a workmen's compensation law, it would also

apply to such cases as Third Party Over, Loss of Consortium and certain extra-territorial accidents. It is necessary, however, to include by endorsement, coverage for the Longshoremans & Harbor Workers Compensation Act, the Defense Bases Act and the Outer Continental Shelf Lands Act.

One of the significant changes is the premium computation provision. Incorporation by reference to the "manuals in use by the company" has simplified the contract but has added some burdens on sales agents and other company representatives to convey to employers the provisions of their company manuals. There may be some criticism on the basis that this is a rather loose way to define the terms of a contract but, strangely enough, no serious complaints have as yet been made. Retrospective rating and premium discount endorsements will continue to be necessary but endorsements covering overtime, payroll limitations and board, lodging and housing have been discontinued.

The limit of liability under Paragraph One (b) (Employers Liability) of the old policy, now simply Coverage B, was always a confusing provision for it would appear in the numerous state endorsements attached to the policy and in varying amounts. Under the new policy the basic limit is $25,000 (except for a few states) which, by agreement with the carrier, may be increased to $100,000 or $500,000. This is the limit per accident and likewise an aggregate disease limit per state.

Heretofore, provisions for voluntary compensation coverage and for "all states" coverage has not been standardized. Under the new program, some progress has been made to this end. An employer may purchase either or both by separate endorsement. Voluntary compensation covers injuries under which the injured would not otherwise be entitled to the protection of any workmen's compensation law. The "all states" endorsement is an attempt to provide a form of compensation coverage for injuries in states not cited in Item 3 of the Declaration. Such changes materially affect employers having salesmen, service men, inspectors, airplane crews, etc. who travel regularly from state to state and occasionally outside the United States. They provide a much more complete protection for the employer.

The industry is hard at work on further simplifications of these workmen's compensation contracts. The ultimate goal – a contract effective in every state and without endorsement.

LOSS OF HEARING CLAIMS

Loss of hearing claims are a comparatively new problem in the field of Workmen's Compensation. The development of a recognized compensable disability has raised a complex and controversial problem of greater magnitude, perhaps, than ever presented before in this field, and which has great social, economic and political implication.

Unlike former occupational diseases, whose compensability has been recognized over the years, the problem cuts across all mankind. Silicosis was specific to particular occupations; deafness is a condition to which all persons are subject.

The problem originated with *Slawinski v. J. H. Williams & Company,* 298 N. Y. 542 (1948) when the New York Court of Appeals held that deafness due to industrial noise was an occupational disease for which plaintiff was entitled to an award under the scheduled section of the act even though there was no wage loss. Subsequently, the Wisconsin Court in *Wojcik v. Green Bay Drop Forge Company,* 60 N.W. 409 (1953) made a similar finding of compensable disability, again without a showing of a wage loss. These two cases, having established the principle, have provoked a host of activity among those interested or affected in an attempt to reach a workable solution to the problem presented.

Exposure to harmful types of noise causes deterioration of the nerve endings of the organ of Corti in the inner ear. If the exposure is of short duration, some recovery will occur following removal from the noisy environment. If such exposure is prolonged, permanent damage to the hair cells results, and after removal from the exposure for an extended period of time, the degree of permanent damage may be measured by a competent otologist. Medical research is under way to develop methods of measuring and distinguishing temporary auditory fatigue and permanent hearing loss.

In an excellent paper delivered at the third Miami Insurance Law Conference in Miami, Florida on March 29, 1955, and reprinted in full in the Insurance Law Journal for May, 1955 (and from which, with the author's permission, this report

has gratefully borrowed much material) Mr. Floyd E. Frazier states with reference to the problem of the determination of loss:

"Much of the difficulty encountered in attempting decisions on any of the complex problems involved stems from the absence of established medical fact. Although eventual decisions concerning legislation and standards will, of necessity, be compromises between what is socially desirable and what is economically possible, the ground work must be laid through medical research to develop reliable information on which such decisions may be based. To indicate the complexity of this problem it is well to describe briefly in non-medical terms the many paths along which the search for medical facts is leading.

"If all hearing losses were of industrial origin, the problem would be relatively simple. The fact remains, however, that some types of hearing losses are in no way connected with industrial exposure. For the purposes of this discussion it is sufficient to classify hearing losses in two general types, namely, conductive and nerve impairment types.

"Conductive types of hearing losses are in no way related to exposure to industrial noise. They are caused by obstructions of some sort in the outer or middle ear which prevent the sound vibrations from reaching the nerve mechanism in the inner ear. A common and easily correctible example is an accumulation of wax in the ears. A less frequent but more serious type of conductive loss arises from otosclerosis in which case sound vibrations are not transmitted through the middle ear to the inner ear. Fortunately, this type of hearing impairment can easily be diagnosed and distinguished from the type of hearing loss which results from exposure to noise. It is also, in many cases, correctible by surgery.

"The second type of hearing loss is the nerve deafness centering in the inner ear and which may or may not be due to noise. Extreme difficulty arises in these cases because often it is impossible for the otologist to distinguish between such losses due to noise or to other sources other than by assumption based on the history of the patient.

"Nerve impairment types of hearing losses may arise from many sources other than occupational exposure. The most significant of these, from a compensation standpoint is presbycusis, the degeneration of the hearing mechanism which accompanies advancing age. This has long been recognized and discussed in the scientific literature. * * *

"Other types of hearing losses which are indistinguishable from those caused by exposure to noise are present as an after-effect of some of the common childhood diseases. Otologists also state that similar effects may be produced by use of certain drugs of which streptomycin is an example. The losses from these sources are highly variable. It is, of course, obvious that industry should not be penalized for losses of this type which existed prior to employment. The only remedy is to have pre-employment audiograms made on all new workers so that the existence of the hearing loss before employment may be established."

While standards and methods for measurement and evaluation of hearing loss are still being set, social and political forces are at work.

There have been introduced in the legislatures of Illinois, Michigan, Massachusetts, North Carolina, New York, Oklahoma, Missouri, Wisconsin and Delaware, legislation or amendments to existing legislation concerning this subject. In some states compensation would be allowed only where the loss of hearing is caused by a sudden or untoward event, i.e., an accident. In other states compensation would be payable only where there has been a continued or prolonged exposure to industrial noise resulting in a so-called occupational disease. In still other states either of these causes is made compensable.

Much of the controversy stems from the concept of payment of benefits without a wage loss. As Arthur Larson, Under Secretary of the Department of Labor, points out, compensation benefits should be "income loss insurance." Labor, of course, argues that there is no difference in paying compensation for loss of hearing in the absence of an earnings loss and in paying a scheduled disability for the loss of an eye.

The administrative problem as to existing liabilities is troublesome. For example, at the present time in New York State, the Workmen's Compensation Board has es-

tablished a rule based upon the medical advice from the otologists acting as a committee of counselors on this subject, that a person must be removed from the established noisy atmosphere or conditions for at least six months before his claim can be processed for determination as to the extent of the loss sustained, the theory being that the loss is not permanent until that length of time has elapsed, during which the ears are not subjected to the more or less continuous impact of the dangerous noise. This, of course, has acted as a stoppage in New York State, and many claims have not been presented because of this more or less arbitrary six months provision.

The big problem to industry is the economic one. Spokesmen for industry have pointed out that most employees with occupational deafness have acquired it over a long period or time, and that rates collected by insurance carriers have not included a premium for such a hazard, nor have they or self-insurers established reserves for such accumulated liabilities. No one knows the extent of the potential cost, because of the uncertainties involved, but estimates have been made running from a few millions to billions of dollars. Mr. Henry Sayer, General Manager of the New York Compensation Insurance Rating Board, has said, "In assuming now to make provisions out of the monies of industry, for the effects of years of environment of noise, we are assuming an ability to do the impossible."

This foregoing is not intended to be technically definitive, or to do other than to point up the problem in a general way.

PROPOSED UNIFORM EXTRA-TERRITORIAL PROVISION FOR WORKMEN'S COMPENSATION LAWS

Without doubt, many trial lawyers in the field of workmen's compensation have encountered the many perplexing problems that arise when an employee sustains a work injury outside his home state or province, or is engaged in casual work for an employer who has various places of business in different states. It has been apparent to many interested in the administration of workmen's compensation laws that employers, workers, insurers and administrators would be greatly benefited if every one of our state compensation laws had the same extra-territorial application. To accomplish this, each state law would have to be amended and amended uniformly.

While uniform benefit provisions countrywide may not be feasible because of varying economic conditions, a uniform extra-territorial provision would appear to be definitely advisable.

In 1950, when the chairman of this committee was chairman of the Committee on Workmen's Compensation and Employers Liability Insurance Law of the Section of Insurance Law of the A. B. A. a study was begun by that Committee and this report is little more than a report of the progress made by this American Bar Association Committee. Mr. Ashley St. Clair, of Boston, has been active in the work of the committee and particularly in one of its projects which brought together representatives of employers, representatives of insured employers, self-insurers, labor, state compensation insurance fund and lawyers through the organization of a committee made up of representatives of various national organizations representing these groups of interested parties.

This committee met in Chicago in August of 1954, and appointed a subcommittee which is continuing work on this project. It is quite apparent that there are divergent views which must be reconciled, but all agree that the objective sought is desirable and if attained will benefit all interested parties. It was likewise agreed that to accomplish this objective, active support of all the interested groups must be given in each state so that uniform legislation can be passed.

The general objectives which it is hoped to accomplish by such uniform legislation, as originally conceived by the A. B. A. Workmen's Compensation Committee, can be stated briefly as follows:

1. An employee sustaining a work injury outside the state where he is usually employed or where he was hired should have a right to compensation in some jurisdiction.
2. This right to compensation must be sufficiently certain so that he will receive compensation promptly, and in most cases without litigation. In a case where more than one compensation law is applicable, an injured employee should be permitted, within reasonable limits, to elect the

act under which he will prosecute his claim.

3. The employer should not be subjected to a double recovery or threat thereof.

It is hoped that this committee of trade associations and organizations operating on a national basis will be able to adjust their differences and to draft comprehensive legislation to accomplish this worthwhile objective. The aid and assistance of our members should be given wholeheartedly to this project.

Respectfully submitted,
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The End of the "Compensated Surety Defense" in Subrogation Cases

GEORGE C. BUNGE* (deceased)
Formerly of Chicago, Illinois
Chairman, Fidelity and Surety Committee, 1954 — 1955
and
MARVIN F. METGE*
Chicago, Illinois

FOR the past 30 years, surety companies have been bedeviled by the so-called "Compensated Surety Defense" in subrogation cases. The recent decision of the New Jersey Supreme Court in *Standard Accident Insurance Co. v. Pellecchia*[1] repudiates this defense, and the theories upon which it is based. The opinion by Mr. Chief Justice Vanderbilt, is cogent, comprehensive, and conclusive. It may be optimistic to say that this decision marks the "end" of the "Compensated Surety Defense," in view of the number of courts which have embraced this illogical and shortsighted doctrine. However, if not actually the end, it is certainly the beginning of the end, for the force and logic of the *Pellecchia* opinion surely must ultimately sweep away the misconceptions which have prevailed to such an extent in this field. Those Courts, which are already committed to a contrary doctrine, may, in deference to *stare decisis*, continue to honor that commitment for a time. Those courts which are not clearly committed on the subject (which include the courts of New York and Illinois) will certainly follow Mr. Chief Justice Vanderbilt in the *Pellacchia* case, and repudiate the "Compensated Surety Defense" *in toto* whenever it comes before them.

The "Compensated Surety Defense" in subrogation cases is based, in essence, upon the proposition that a compensated surety will not be permitted to enforce a right or claim, as subrogee, against a party which was not negligent or actually at fault, even though otherwise legally liable. The theory is that since the compensated surety has received a premium for assuming the risk. it does not have the same rights or standing as others, in a court of equity, and that as between a compensated surety, seeking to enforce the equitable right of subrogation, and a defendant, who is legally liable but not actually at fault, the equities are against the surety.

The occasion for the application of this doctrine arises most frequently in connection with fidelity bonds. A typical situation occurs when an employee who is cov-

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[1] *Standard Accident Insurance Co. v. Pellecchia*, (1954) 15 N.J. 162, 104 Atl. 2d 288.

ered by a fidelity bond, forges the employer's signature or endorsement on a check, which he cashes at a bank. Under the Negotiable Instruments Law, the cashing or paying bank usually is liable for the resultant loss, whether it was negligent in failing to discover the forgeries and in cashing the checks, or not. Ordinarily, it is the legal duty of a bank which pays or cashes any check to determine the authenticity of the signatures and endorsements it bears, and it is legally responsible for any failure to do so. Often, prior endorsements are specifically guaranteed by the bank. It may be that, as a practical matter, the bank and its employees had no way of checking the authenticity of the forged signatures, and were not negligent in failing to discover the forgeries. Nevertheless, the bank is usually held to be legally responsible. That responsibility is one of the foundations of the Negotiable Instruments Law, and banks would not long remain in business if they did not assume it. This is not the time nor the place to discuss the details of the Negotiable Instruments Law, and there are, of course, exceptions to the general rule. Suffice it to say that in many cases where a forgery has been committed by a bonded employee, some bank or banks are legally liable for the resultant loss.

Consequently, in the typical case just mentioned, the employer of the dishonest employee, whose signature or endorsement has been forged, has a perfectly valid cause of action for reimbursement against the bank which cashed the checks, or against the bank on which they were drawn. Since it carried fidelity insurance on its employees, and the forgery was committed by an employee, the employer also has a claim against the fidelity insurer. What happens if the fidelity insurer goes ahead and pays the claim? Ordinarily, an insurer which pays a claim is subrogated to all rights its insured may have to recover the loss from others, and the insurer-subrogee would be entitled as subrogee to recover the loss from the bank. The "Compensated Surety Defense" denies these subrogation rights to a compensated surety where the defendant, though legally liable, is not guilty of negligence or of an active wrong.

The theory and general principles of subrogation are well understood, and need not be elucidated here. The general rule is that an insurer, on paying a loss, is subrogated in a corresponding amount to the insured's right of action against any other person responsible for the loss.[2]

The courts which recognize the so-called "Compensated Surety Defense" say, in substance, that there is an exception to this rule, when the person responsible for the loss, i.e., the bank, though legally liable, is not actively at fault, and the party claiming subrogation rights is a compensated surety or insurer, which has received a premium to enforce the legal liability of the bank in favor of a compensated surety, as subrogee, on the general principle that it would be inequitable to do so, or, to put it another way, that the compensated surety-subrogee-plaintiff has failed to prove a "superior equity" as against the non-negligent bank-defendant. This is the essence of the "Compensated Surety Defense."[3] Some courts have added an "election of remedies" fiction to the "Compensated Surety Defense," which is, simply, that by collecting from the surety on the fidelity bond, the employer has somehow waived its undoubted legal rights to recover from the bank, and that, consequently, there is nothing for the surety to be subrogated to, and the bank is "home free," as soon as the surety pays off.[4]

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[2]Appleman, Insurance Law & Practice, Vol. 6, p. 517.

[3]Cases supporting the "Compensated Surety Defense" on the ground that the surety-subrogee does not have a "superior equity" include:
Meyers v. Bank of America, (1938) 11 Cal. 2d 92, 77 Pac. 2d 1084;
Louisville Trust Co. v. Royal Indemnity Co., (1929) 230 Ky. 482, 20 S.W. 2d 71;
New York Title & Mortgage Co. v. First National Bank, (CCA, Mo., 1931) 51 Fed. 2d 4485;
Washington Mechanics Savings Bank v. District Title Insurance Co., (CA, D.C., 1933), 65 F 2d 827;
National Surety Corp. v. Edward House Co., (1941) 191 Miss. 884, 4 So. 2d 340, 137 A.L.R. 697;
American Alliance Insurance Co. v. Capitol National Bank, (1946) 75 Cal. App. 2d 787, 171 Pac. 2d 449;
U.S.F. & G. Co. v. First National Bank in Dallas (CCA Tex., 1949), 172 Fed. 2d 258;
J. G. Boswell Co. v. W. D. Felder & Co., (1951) 103 Cal. App. 2d 767, 230 Pac. 2d 386;
Hensley-Johnson Motors v. Citizens National Bank, (1953) 122 Cal. App. 2d 22, 264 Pac. 2d 973.

[4]Cases denying subrogation rights to compensated sureties because of an "election of remedies" include:
American Surety Co. v. Bank of California, (CA, Cal., 1943) 133 Fed. 2d 160;
U.S.F. & G. Co. v. First National Bank, (CA, Tex., 1949) 172 F 2d 258;
Hensley-Johnson Motors v. Citizens National Bank, (1953) 122 Cal. App. 2d 22; 264 Pac. 2d 973.

Most surety attorneys have always been of the opinion that both theories have marshmallow foundations, insufficient to withstand a single gust of legal logic, such as has now been applied by Mr. Chief Justice Vanderbilt in the *Pellecchia* case. Explanation for the origin and growth of this fallacious doctrine may, perhaps, be found in economic and social conditions, and in the maxim, "Hard cases make bad law." A Kentucky court back in 1905, seems to have originated the "superior equity" doctrine, in *American Bonding Company of Baltimore v. First National Bank of Covington, Ky.*[5] While perhaps still brooding over the outcome of the Civil War, the court was confronted with a controversy between a great eastern financial insurance octupus and a "pore li'l ol' " innocent, well-meaning, Kentucky bank, which at that time, probably had never heard of forgery insurance. The court, accordingly, administered homespun Kentucky justice in favor of the Kentucky bank. However, the "Compensated Surety Defense" was chiefly developed in decisions handed down amidst the bank failures and near-failures of the Great Depression. To hold a bank which was having a hard time to survive, and whose influential stockholders were facing possible double liability on their stock, liable to the corporate surety as subrogee, in a case where the bank was not actively at fault, was not in harmony with the temper of those times. The changed conditions prevailing today have removed many of the emotional factors, which may have contributed to the development of the "Compensated Surety Defense." It is time for a new look at, and a fresh analysis of, the problem. This is exactly what it has received from Mr. Chief Justice Vanderbilt in the *Pellecchia* case.

Surety company attorneys have always regarded the "Compensated Surety Defense," and the legal propositions on which it is based, as unsound and illogical, and have vigorously resisted their application in the courts. It is a fundamental principle of surety and insurance law that a surety or insurer which pays a claim under its contract succeeds or is subrogated to all of the rights and remedies which its obligee may have against others for the recovery of the loss. This principle is universally recognized and applied, and its application is contemplated by and often expressly recognized in surety and insurance contracts. Why should the fact that the surety or insurer receives a premium make any difference? What business is it of the party who is ultimately legally liable for the loss (in this case, the bank), that another party has had the foresight to carry insurance or to obtain a surety bond? Why should the party on whom the law imposes legal responsibility escape that responsibility because of that fortuitous circumstance? Furthermore, as everyone knows, insurance premiums are based upon net losses sustained and expenses incurred by the insurers, and such recoveries as compensated sureties and insurers are able to make tend ultimately to reduce the premiums charged. To the extent that a compensated surety or insurer is not permitted as a subrogee to enforce the legal liability of a bank or other third party to its insured, that bank or third party is, in effect, made the beneficiary of some one else's insurance, while the party who actually paid for the insurance is compelled to pay a somewhat higher premium on that account.

Apart from these considerations, the "Compensated Surety Defense" poses a very serious practical problem for the fidelity insurer. If it pays the fidelity claim promptly, it thereby throws away the possibility of recovering from the bank, which, under the law, is legally responsible for it. If, on the other hand, it delays paying the claim, and can induce its insured to "go after" the bank first, the fidelity insurer may wind up with no loss at all. Whether the loss falls on the fidelity insurer or on the bank, thus, depends upon which party the employer elects to "go after" first, surely an illogical, capricious, and unsatisfactory basis for deciding a matter of this kind.

The whole situation takes on a sort of "Alice in Wonderland" flavor, in the light of the fact that nowadays practically every bank carries its own forgery insurance and thus is itself, protected by insurance. The courts which support the "Compensated Surety Defense" thus are, in most cases, refusing to permit one compensated surety to recover from a bank which is protected by another compensated surety on the theory that the equitable standing of a compensated surety is lower than that of the bank. Actually, not the bank, but the bank's compensated surety is the real defendant in most such cases and a compen-

[5] 27 Ky. L.Rep. 393, 85 S.W. 190.

sated surety is the actual beneficiary of the "Compensated Surety Defense."

Surety companies faced with the "Compensated Surety Defense" have tried to find some means of meeting their obligations promptly and, at the same time, preserving the right to recover the loss from the party who otherwise would be legally responsible for it. However, the courts which support the "Compensated Surety Defense" have refused to be influenced by such devices as assignments,[6] loan receipts,[7] or agreements by the surety to pay the claim if its obligee fails to recover from the bank,[8] and have almost uniformly held against the surety, notwithstanding their use. It seems evident that little help can be expected from devices of this kind.

Those who have opposed the "Compensated Surety Defense" have not been entirely without encouragement. Prior to the recent opinion by Mr. Chief Justice Vanderbilt, in the *Pellecchia* case, there have been occasional decisions from time to time, sustaining the subrogation rights of a compensated surety, and repudiating one aspect or another of the "Compensated Surety Defense."[9] However, none of these decisions, valuable as they are, approaches the broad and brilliant legal analysis of the whole subject, which is contained in Mr. Chief Justice Vanderbilt's *Pellecchia* decision; also, they have been in the numerical minority so that it could be said with some justice that the "weight of authority," if not of reason and logic, supported the "Compensated Surety Defense."

Standard Accident Insurance Company v. Pellecchia[1] involved a variation of the standard situation. Pellecchia, the culprit, was the employee of the maker of the checks, Columbia Trust Company, which was induced to issue them by Pellecchia's misrepresentation and fraud. The checks came into the possession of Pellecchia for delivery to the intended payees; Pellecchia, however, forged the endorsement of the purported payees and cashed the checks at Federal Trust Company which, in turn, endorsed and collected them. Federal Trust Company's endorsement contained a guarantee of all prior endorsements. Upon the discovery of the forgeries and of the resultant loss, Columbus Trust Company made claim against its fidelity insurer, Standard Accident Insurance Company, which paid the full penalty of its bond. After some proceedings, which are not of interest here, Standard Accident Insurance Company brought this suit, as subrogee of Columbus Trust Company, against Federal Trust Company and also made Pellecchia, the defaulter, a party defendant to the case. The defendant Federal Trust Company moved for a summary judgment upon the ground, among others, that the "Compensated Surety Defense" precluded any recovery from it by Standard Accident Insurance Company, as subrogee. This motion was allowed, but the summary judgment in favor of the defendant entered by the trial court was reversed by the Supreme Court of New Jersey in a unanimous decision. The opinion by Mr. Chief Justice Vanderbilt contains a comprehensive review and an analysis of the authorities on this subject and concludes:

1. That the obligation of the defendant Federal Trust Company to Columbus Trust Company to make good the loss resulting from these forgeries, is a contractual obligation.

2. That it is settled law that an insurer which pays a loss "steps into the shoes of the insured and can, through subrogation, enforce the contractual obligation of the third party."

3. That there is no logical basis for making an exception to the general rule in cases of this type; that the "Compensated Surety Defense" has no basis in law or

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[6] *Meyers v. Bank of America,* (1938), 11 Cal. 2d 92, 77 Pac. 2d 1084;
American Surety Co. v. Bank of California, (CCA Cal. 1943), 133 Fed. 2d 160;
American Surety Co. v. Western Surety Co., (1946), 71 S.D. 126, 22 N.W. 2d 429;
U.S.F. & G. Co. v. First National Bank in Dallas (CA Tex., 1949), 172 Fed. 2d 258.

[7] *American Alliance Insurance Co. v. Capitol National Bank,* 75 Cal. App. 2d 787, 171 Pac. 2d 449;
J. G. Boswell Co. v. W. D. Felder & Co., 103 Cal. App. 2d 767, 230 Pac. 2d 386;
Hensley-Johnson Motors v. Citizens National Bank (1953), 122 Cal. App. 2d 22, 264 Pac. 2d 973.

[8] *Hensley-Johnson Motors v. Citizens National Bank* (1953), 122 Cal. App. 2d 22, 264 Pac. 2d 973.

[9] Cases repudiating the "Compensated Surety Defense" include:
Grubnau v. Centennial National Bank (1924), 279 Pa. 501, 124 Atl. 142;
Royal Indemnity Co. v. Poplar Bluff Trust Co. (Mo. App., 1929) 20 S.W. 2d 971;
Liberty Mutual Insurance Co. v. First National Bank (1951), 151 Tex. 12; 245 S.W. 2d 237;
See also:
Natural Surety Company v. National City Bank (1918), 172 N.Y.S. App. 413;
Borserine v. Maryland Casualty Co. (CCA, Mo., 1940), 112 Fed. 2d 409.

logic; and that the summary judgment denying the claim of Standard Accident Insurance Company, as subrogee of Columbus Trust Company, must accordingly, be reversed.

After reviewing the authorities at some length, the court made the following comment:

"• • •. Having discussed the several lines of decisions, we turn to a consideration of the possible solutions on the merits of cases where a surety's action in subrogation against the third party is based on his contractual liability to the insured. They are three in number:

"(1) To prohibit recovery by the surety against the third person, who is thus in effect given the benefit of insurance on which he has not paid any premium and where there is no direct contractual or other relationship between him and the surety.

"(2) To allow the insured to recover from both the surety and the third party and thus to be doubly indemnified—a situation which the law has always deemed contrary to public policy not only by reason of its unfairness but because of its incitement to fraud.

"(3) To give the surety the benefit of the contractual obligation of the insured against the third party by allowing subrogation. It is objected that such a recovery by the surety constitutes a "windfall" in that in the event of such recovery the surety suffers no loss on its surety bond although it has been paid premiums by the insured to reimburse it against just such a loss, as here. This argument loses sight of two fundamental facts: first, that even if the surety recovers against the third party on subrogation it still has been put to the expense of paying agent's commissions on the writing of its bond, to the necessity of investigating the insured's claim and of settling or litigating it, and, second, that the amounts of recoveries by subrogation are taken into consideration in arriving at the amount of premiums to be charged for surety bonds.

"We adhere to the third alternative and give the surety the benefit of the insured's contractual rights against the third person, first, because it is sound in principle, giving force to the contractual relations of the several parties and, second, because it is in harmony with the rule adopted in this State in all other forms of insurance with respect to subrogation. • • • "

The court then commented that actual unconscionable conduct might preclude a party from enforcing subrogation rights in a court of equity, but that nothing of that kind had been shown in this case; also that, if Columbus Trust Company had not been indemnified for its loss by Standard Accident Insurance Company, or if it had decided for one reason or another not to collect from Standard Accident Insurance Company, it admittedly could have recovered from the defendant Federal Trust Company, on the latter's guarantee of endorsement or it could have assigned its claim to another party who could have enforced it against the defendant Federal Trust Company. The court felt that the defendant Federal Trust Company, by accepting and collecting the checks and guaranteeing prior endorsements, had simply assumed a business risk "in the usual course of business with full knowledge of its potential liability and possible ensuing loss" and should not be relieved of the liability thus assumed because of the fortuitous circumstance that Columbus Trust Company carried fidelity insurance. The court then commented further, as follows:

> "It would seem that the cases denying subrogation to a surety of its insured's contractual right against a third party are unrealistic in ignoring the fact that the third party itself is generally insured by another surety or casualty company against losses caused by the neglect of its officers or employees as in this case where the Commercial Casualty had given its bond to Federal for $200,000. In states which follow the criticized rule the surety or insurer of the third party, here the Commercial Casualty, would go free of obligation. These cases are also unrealistic in implying a 'superior equity' in favor of the third-party defendant where a court of equity did not find any unconscionable conduct at all. As applied in the surety-subrogee cases discussed herein the phrase is mere language devoid of meaning."

The force and logic of the *Pellecchia* decision are irresistible. The author of the opinion, Mr. Chief Justice Vanderbilt, enjoys international renown as a jurist and legal scholar. His opinion has completely demolished the "Compensated Surety Defense."

From The Editor's Notebook

In this column, from time to time, the Editor proposes to publish news and views that he believes will be of interest to our members. Any opinions expressed are either the personal sentiments of the Editor or are the opinions of those persons to whom they are attributed.

Members of I.A.I.C. are cordially invited to submit material for this column. If and when you have views to express on insurance and legal subjects, or when you learn of items of news that you believe of general interest, send them in! As space permits, we'll publish them with credit to you as the contributors.

"IT is now common practice in the City of New York for attorneys in personal injury actions to require a fixed 50% retainer (or approximately that) without regard to the work involved," says Mr. Justice Hofstadter, of the Supreme Court of New York, in *I. Howard Lehman v. Bruce Cameron, et al.*, 139 N.Y.S. 2d 812, (April 20, 1955). "The commercial 'law forms' in use in many of these offices," he continues, "incorporate the 50% in the *printed* matter."

Contingent fees, in and of themselves, serve a socially useful purpose, the justice observes. "They enable the client of limited means to procure competent legal assistance, and have their roots in the alertness of the Bar to the needs of the average citizen of modest economic status."

Commenting that, "In recent times, however, this purpose has been perverted," the jurist proceeds to point out some of the resulting evils. He says, "In the personal injury action, with its now almost constant 50% contingent fee, the entire circuit of legal procedure is subverted from beginning to end. The present standard inevitably puts a premium on solicitation that makes the recurrent and sporadic prosecution of 'ambulance chasing' futile, if not absurd. It encourages unjust suits and skirts the periphery of fraud in raising claims and of prejury in their prosecution. It gives rise to the harassment of innocent persons who are needlessly made defendants in sham actions brought more for nuisance value then on merit—notably, for instance, malpractice suits regarded by lawyer and insurance company alike as vexatious and pressure litigation. It generates a glut of frivolous actions which create the unhealthy congestion that plagues our courts. And, in so doing, it results in a breakdown in procedures, causing other litigants to resort to non-judicial forums—such as arbitration—with a resultant loss of prestige and earnings for the Bar generally."

Unjust settlements and excessive verdicts may both result from excessive contingent fees, in the opinion of Mr. Justice Hofstadter. "Bona fide but necessitous claimants are open to exploitation by the overzealous, if not unscrupulous, insurance adjuster who does not hesitate to remind them that 'the lawyer will get half' ". Also, "Juries, who know the facts of life—again 'the lawyer will get half'—compensate beyond what they know to be proper. Motivated by a sense of rough justice and an unconscious identification with the handicapped plaintiff, they wilfully increase the amount of their verdicts."

Expressing the view that the "proliferation of the 50% contingent fee in personal injury actions has so spread throughout the legal body that drastic cure is required," the justice asserts:

> "It is high time that all contingent fees in accident cases be subject to being fixed by the Court after final disposition."

VOLUME I, Number 3, of the Insurance Counsel Journal was the first issue that bore the name of George W. Yancey as Editor. The first two issues were published by him, but in the capacity of President of the Association.

In his first editorial, in October, 1934, Editor Yancey expressed sentiments that may well be repeated here, because they are as true today as they were then:

> "I am conscious that the Journal cannot be made a success by me unless I re-

ceive the criticism, suggestions and cooperation, and very occasionally, the praise of the membership. The Journal belongs to you. It is my ambition, and I know it is the ambition of the officers of your Association, to make it the outstanding Journal of its kind."

George Yancey realized that ambition! The twenty-one and a half volumes of the Journal published under his editorship were outstanding.

With this issue we complete Volume XXII. Looking forward to future issues, your present editorial staff solicits the continued cooperation and contributions of all members of the Association.

THE need for instruction in medical subjects in law schools is the subject of a thought-provoking article by Professor Ben F. Small, of Indiana University, in the August issue of the American Bar Association Journal. Pointing out that "few indeed are the schools that have done anything to prepare their own students for matters medico-legal," Professor Small says, "This neglect is a curious one, particularly in view of the fact that from the other end, the better medical schools have for years felt it necessary to give their students instruction in certain areas of the law."

"Seven out of every ten litigated personal injury cases turn on medical considerations rather than legal," is the premise upon which Professor Small bases his argument for more medical education for law students. He says that practicing lawyers have done much in "fighting themselves clear of their handicap" which has resulted from the lack of such training in law schools, accomplishing this mainly through medico-legal institutes which "have had an unprecedented appeal among lawyers".

THIS year, when the 200th anniversary of Chief Justice John Marshall's birth is being memorialized, it is good to look backward to this great jurist and see him both as a man and as a judge.

As a man, we are told that, "In Marshall's grounds and near his house were several great oak and elm trees, beneath which was a spring; to this spot he would take the papers in cases he had to decide and, sitting on a rustic bench under the shade, would write many of those great opinions that have immortalized his name."[1]

It is understandable that this man, speaking as the jurist—yet imbued with the beauties of nature whence he found at least some of his inspiration—should say that our government is "emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit".[2]

It is worth thinking about that this same glorious statement should find its way into Webster's Reply to Hayne, ("It is the people's Government; made for the people; made by the people; and answerable to the people.") and into the immortal words of Lincoln's Gettysburg Address that "a government of the people, by the people, for the people, shall not perish from the earth."

The influence of Marshall has been the subject of much comment, but we like this one:

"There has been a tendency to misread that influence as placing property rights above human rights. But Marshall respected property precisely because he regarded its protection as one of the indispensable human rights. Without Marshall the U.S. might not have become as much a 'government of laws and not of men,' as it now is. Without Marshall the courts might not have been, as much as they now are, the inviolable refuge of all citizens against executive or legislative abuses. Marshall's handwriting on our history is large. It lives best in the words chiseled above the Supreme Court whose immense powers and prestige are his greatest memorial: 'Equal Justice under Law.'[3]"

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[1] *The Life of John Marshall*, Vol. IV, p. 67, by Albert J. Beveridge, published by Houghton Mifflin Company.

[2] *M'Culloch v. Maryland*, 4 Wheaton 316, 405.

[3] From LIFE Magazine's Editorial Page, August 29, 1955.

Comments on the Problem of Malpractice in New York State

WILLIAM F. MARTIN*
New York, New York

THERE is probably no profession today which has higher standards of admission to its ranks than medicine and yet there has come about an alarming increase in the number of malpractice claims presented by patients. Evidence of this can be obtained nation-wide.

I have been asked by the Editor of our Journal to comment on the situation in New York State. There are not available any exact figures on how many claims and suits arise each year in this field of litigation but the Medical Society of the State of New York Group Malpractice Insurance and Defense Plan has a large amount of statistical material available from which some significant calculations can be arrived at. There are 23,545 members of the Society and 13,539 of them, or 58% of the total, are insured with the Group Plan. In a recent 12 month period, 310 lawsuits were started against members of the Plan. In addition to the number of suits, there are almost the same number of claims presented, so that about 600 separate and distinct factual situations arise each year where the relation of patient and physician has so deteriorated as to cause the patient to seek legal redress. There is some oversimplification in this statement as many of the patients remain on a friendly basis with the physician involved but still feel that an incident which has occurred entitles them to compensation.

There is also a considerable volume of claims and cases presented against members of the Group Plan which may not come to the attention of the Group Plan. The state of New York has removed all immunity from itself and its various subdivisions in tort actions so that if a doctor is treating at a state institution, very often the only claim for damages arising as a result of claimed malpractice is made against the State. If the doctor is treating the patient gratuitously in an institution maintained in whole or in part by a municipal corporation, or in the course of home care service maintained by such public institution, the municipality, under 50-d of the General Municipal Law, is liable for any malpractice which occurs in the course of such treatment. This Section 50-d protects a physician or dentist only when treating a patient gratuitously. It has been held not to cover a resident who is paid a modest stipend by the hospital for his services. *Schmid v. Werner,* 303 N.Y. 754. An effort is being made to amend this law to cover the residents and internes.

There are also pending in the state courts more than a hundred actions against uninsured doctors and there are at least that many pending against doctors insured by companies other than the Group carrier. There are also situations where hospitals are named defendants and at times members of their resident staff are named as co-defendants. There is a very considerable volume of litigation pending against hospitals which directly or indirectly involve claimed acts of malpractice. Thus, in an action against city for damages for premature discharge of plaintiff from city hospital, evidence whether failure of doctor and nurse to make note of doctor's direction to keep plaintiff for further observation and whether nurses' discharge of patient contrary to hospital routine were administrative acts was sufficient to take to jury issue of city's negligence. *Adams v. City of New York,* (Decided Feb. 1, 1955) 137 N.Y.S. App. 2d 158. All of which adds up to a very formidable threat to the peace of mind of physicians.

The Medical Society of the State of New York is aware of this situation and, through its Malpractice and Defense Board, various Grievance Committees and Mediation Committees at the county level, is seeking to improve the standards of medical care and to give patients a forum where they present their grievances against doctors without seeking redress through the courts. A considerable volume of preventative work is going on at all times.

At this time, it would be salutary to point out that no board or committee organized by medical societies in the state of New York indulges in any repressive tactics of any kind whatsoever. The myth that a doctor who testifies for a plaintiff in a malpractice action is subject to dis-

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cipline by his fellow-doctors may or may not be true in other jurisdictions, but in almost thirty years of my close association with the Medical Society of the State of New York, I can categorically state that no doctor was ever disciplined for testifying for the plaintiff in a malpractice case. In the trial of these cases, industrious counsel do not encounter great difficulty in obtaining expert testimony, and those who cry the loudest about their inability to get proof really do not have a case in the first place.

This situation—causing, as it has, a rise in the cost of insurance—has added to the economic burdens of the practitioner. The state of New York is, for the purpose of cost coverage, divided into two sections consisting of the metropolitan and upstate areas. A policy with limits of $5/15,000, exclusive of surgery, x-ray, cosmetic plastic, and electro-shock therapy, costs an upstate doctor a premium of $40. The same coverage in the metropiltan area is $76. There is a policy which provides for general practice and certain types of minor surgery but excludes x-ray, cosmetic plastic surgery and electro-shock therapy. This policy, for the minimum limits stated above, costs $65 upstate and $126 in the metropolitan area. Full surgical coverage but with the exceptions of x-ray, plastic surgery and electro-shock therapy, costs an upstate doctor $119 and the metropolitan doctor pays $226. X-ray, cosmetic plastic surgery and electro-shock therapy are not written on the same basis, and there must be a showing of character and experience to obtain coverage. Actually, x-ray therapy administered by qualified specialists does not seem to present the great risk that it once did but occasionally a bad situation arises. Cosmetic surgery is hard to write because a judge and jury often feel that no matter what the doctor says, the patient is to be believed when he or she testifies that the doctor promised a perfect end result. There is a considerable overlay of psychiatric complications in these cases. A substantial premium for electro-shock therapy became necessary when a spate of cases of this sort broke out several years ago involving fractures and even death. In order to get coverage for electro-shock therapy today, the doctor must state where and under what conditions he gives his treatments and show special training.

The New York problem regarding rates for malpractice insurance is not an isolated one. Delegations of doctors from many other states have sought advice from the New York State Medical Society in relation to their problems. In some states, it is very difficult to obtain a policy of malpractice insurance. Some benefits of the New York State Plan are not available elsewhere. While the Board of the State Society is constantly examining the experience, and eliminates assureds who seem to present too great a risk to the general membership, no doctor may lose his insurance until the board, all the voting members of which are members of the New York State Medical Society, so decide. It is to be pointed out that the members of this malpractice board do not intrude into the management of a claim or suit. Their fundamental problem is to review the experience after the cases and claims are closed.

There are many factors which account for this type of litigation. Those who are interested may read an article entitled, "Let's Sue Doc—A Growing Problem," by William C. Stronach in the Illinois Medical Journal, Volume 104, Number 6, December 1953. There is another well-considered article, "Are Malpractice Claim Prevention Programs Worth While?" by Howard Hassard of Pearl, Baraty & Hassard, of San Francisco, which appears in the publication entitled New York Medicine, Volume X, No. 16, August 20, 1954. The author agrees fundamentally with what is stated in those articles, namely, that inflation, the dilution of the personal relationship between the patient and physician, changes in the law and many other factors are at play. A Detroit attorney, Clayton C. Purdy, who has handled these cases in Michigan says: "It is my observation that the thoughtless or inadvertent criticism of one physician of the work of his fellow physician has been the cause of the majority of the unwarranted malpractice actions." One can add that many of these litigants have been alerted to the possibility of a malpractice claim during the course of workmen's compensation hearings and some are encouraged by insurance companies who feel that the results of an accident in which the claimant was involved were complicated by poor medical and surgical treatment. They have had their assured in the accident case bring a third party action against the physician.

Louis J. Regan, able California lawyer-

doctor, who has written extensively on the subject of malpractice has an interesting article entitled, "Malpractice An Occupational Hazard," in the Journal of the American Medical Association, December 4, 1954 issue. He says at Page 1318 that there are many "secondary causes" that cause malpractice suits, among which are, "1. Cases in which patients are urged to sue by relatives or friends who are physicians, lawyers or nurses; 2. Cases in which physicians have sued to collect their bills from dissatisfied patients, or have used irritating pressure methods in collection efforts; 3. Cases in which patients were surprised and shocked by the amount of the fees charged; 4. Cases in which patients resented having been kept waiting in the office or conceived that they had in some other way been affronted; and 5. Most frequently, cases in which there has been criticism by some physician of the treating physician's care of the patient or the result obtained."

Once a patient goes to a lawyer to discuss his problem some very unusual lawsuits develop not always against the doctor involved. Recent illustrations are interesting. There was a verdict in New York County of $100,000 brought in against a drug company which sold a gauze claimed to be wholly absorbable that was left in a patient. Some months after the gauze was inserted in the course of an operation, an obstruction developed and another operation was performed. A quantity of the gauze had to be removed, with claimed dire end results. The case was compromised for a somewhat lesser amount. The case of *Perlmutter v. Beth David Hospital,* 308 N.Y. 100, involved a claim that a hospital "sold" blood to a patient and had impliedly warranted that the blood was fit for its intended use whereas it was not. It was claimed that the blood was not fit or of merchantable quality but instead contained jaundice virus, with the result that the patient was afflicted with homologus serum jaundice or homologous serus hepatitis. The court of appeals reversed the appellate division and dismissed the complaint. It was held that a contract between a hospital and a patient at the hospital for medical care and treatment is one for services and is not divisible, and that concepts of purchase and sale cannot separately be attached to the healing materials supplied by the hospital for a price as part of its medical services; and when service predominates and the transfer of personal property is an incidental feature, the transaction is not a sale within the Sales Act. It was held that what was described in the complaint was not the purchase and sale of a given quantity of blood but the furnishing of blood for transfusion for a stated sum as part of and incidental to medical treatment. This is a very important decision particularly when the discovery of holmologous jaundice in blood by any known test is impossible at the present time. A contrary decision would hold the hospital responsible for something that it could not in the exercise of care prevent.

Another decision in the court of appeals was the case of *Vera Mrachek v. Sunshine Biscuit, Inc.,* 308 N.Y. 116. In that case, the plaintiff filled out an employment application form and was sent to rooms maintained by the defendant for first aid and pre-employment physical examination. The negligence of a physician employed by the defendant in attempting to take blood from the applicant's arm as a basis for a blood test caused the left hand to lose all feeling and to develop a paralysis diagnosed as causalgia. Defendant, a private industrial corporation was held liable for the negligence of the physician against whom the action had been discontinued. The court decided that the rule exempting hospitals from liability for the negligence of physicians and nurses in the treatment of patients also applies to private corporations which engage physicians for treatment of employees or third persons. But this rule was inapplicable since the plaintiff was not a patient of defendant's physician, had not asked for treatment and had not undergone any treatment or care at his hands; it appeared the physician was a regular employee of the defendant who worked on the defendant's premises daily in an office entirely equipped by the defendant; was paid a salary semi-monthly, like any other office employees of the defendant; the usual payroll deductions were taken from his paycheck and he was covered under the Workmen's Compensation Law. He did not exercise any independent discretion or judgment in determining whether or not to draw the applicant's blood, as he was required by the employer to extract a small quantity of blood and forward it to a testing laboratory which conducted the actual blood test. The physician was not, therefore, acting as an independent contractor

exercising his own discretion but by demand of the defendant.

I cite these three cases to show that problems of malpractice concerns hospitals, industrial corporations and drug companies, as well as the physicians themselves.

The courts of New York State starting with the law enunciated in the classic case of *Pike v. Honsinger,* 155 N.Y. 201, have dealt fairly with the medical profession and there is nothing about the present rash of cases that is caused by any particular decisions of the court. I have read that in other states a doctor from a different part of the state is not allowed to testify as to the practice of a doctor in a community other than his own and sometimes is carefully restricted to testimony only in relation to the specialty which he practices. Such is not the case in New York. Any doctor may testify but of course his testimony will always be weighed in relation to his past experience, his present connections and any other data that can be elicited regarding his past. His testimony may not be very convincing but if he creates an issue of fact, the defendant is put to his proof and the case may go to the jury. One note of caution in the trial of these cases—calling too many experts for the defendant may sometimes prove the truth of the old rule that too many cooks spoil the broth. It is better to have one or two effective experts than to call a considerable number. Not only may they have mutually inconsistent points in their testimony but a jury has a feeling that it isn't quite sportsmanlike to overwhelm a plaintiff in one of these cases by sheer numbers.

Space does not admit of our giving the details of a cross-section of the cases that have been observed. Experience has taught us that even when a doctor makes a mistake for which he may have to pay in damages, if he is fair with his patient, the patient will probably remain a friend and the negotiations that result from the mistake can be handled on a much more amicable basis. Not only must a doctor be fair with a patient and family telling them of any complication that has arisen but he must be prompt. Some years ago, we had a case upstate where a doctor broke off a needle in a patient. He said that he intended to tell the patient about a week after it happened but the patient and her husband were very nervous and he did not want to worry them right away. Unfortunately, an anonymous letter was received by the husband of the patient the day after the needle broke warning him that it was in his wife.

When a surgeon does any kind of gynecological work and encounters a fistula as a result of his operation, it is always wise to seek out consultation and for the doctor to tell the family that he is so doing.

A factor which has definitely contributed to an increase in the amount of malpractice litigation is the availability of discovery proceedings which allows lawyers to exhaustively weed out the facts. The courts of the state of New York in negligence cases have, with some modification, adopted the Federal Rules. Prior to the adoption, there was considerable groping in the dark for information, which could be obtained only in very special circumstances. Consequently, many lawyers were disinclined to institute such suits. Most of this information is now acquired by the plaintiff's lawyer at very little expense. However, considerable expense may be incurred by the doctors, as the lawyer may sue every doctor whose name is on a hospital record and examine them all before trial.

There is no branch of medicine or surgery that is immune from malpractice suits. Whether a man be a general practitioner, an internist, pediatrician, dermatologist, or engaged in any one of the surgical specialties, problems arise which make it very comfortable for him to have coverage.

Another factor contributing to the increase in suits and claims is the physicians' use of new drugs without bearing in mind the literature of the drug companies concerning the contra-indications and tests to be employed through the period of treatment. Some years ago, we settled a case for a doctor who was giving an anti-coagulant to treat a circulatory condition from which his patient suffered. He did not understand that certain tests are necessary to make sure that the anti-coagulant did not produce excessive bleeding beyond the tolerance of the patient and even when the patient told him he was bleeding, the doctor told him to continue using the drug until he finished. The patient then went into shock and the doctor, realizing his own limitations, rushed the patient to a hospital where the patient's life was saved. The doctor must not only read the initial articles written about a medicine but must

keep up with the current literature and be aware of the side effects which appear as the drug is put into more frequent use.

Everything about an operation—from the time the patient is rendered unconscious until the time he regains consciousness—entails watchfulness upon those into whose care the patient was entrusted, to avoid a great number of perils which may ensue. The Court of Appeals of New York, in the case of *Santos v. Unity Hospital,* 301 N.Y. 153, decided that a pregnant woman who is in labor in the labor room must not be allowed to go without surveillance. Despite the great rarity of pre-partum psychosis, as was shown by Judge Desmond in his dissenting opinion, it was the feeling of the majority that a verdict for $35,000 should be sustained because the woman was not constantly watched prior to her delivery while in the labor room.

In the state of New York, the statute of limitations in malpractice actions is two years. A doctor may sue for services rendered at any time during six years. Thus, if the doctor waits until two years have elapsed to bring an action for services, a counterclaim for malpractice would be barred. Yet constantly we are faced with counterclaims for malpractice in actions for services rendered within two years. There is something wrong with the patient-physician relationship when a doctor has to repeatedly sue patients for his bill, and the decision to sue should be a very rare exception instead of the rule. Certainly, before the doctor sues, he should make sure that the treatment was correct. Not too long ago, we had an instance where a doctor dunned the patient for an $85 bill for treatment of a finger injury, only to be faced with a counterclaim which stated that the doctor missed a severed tendon in repairing the finger.

I do not go along with the thinking of some of the plaintiffs' negligence lawyers' associations which have recently spoken of the social concept that for a hazard that exists there should be remuneration regardless of fault. Some of these men in discussing spinal anesthetic paralysis cases and bizarre effects of other anesthetic agents have said that since in the present state of knowledge regarding those modalities accidents will occur and fault is impossible to prove, the patient should be protected and insurance should cover such a situation. This reminds me of the comment made by an Appellate Division Justice, recently resigned, that some of the arguments advanced by plaintiffs-appellants in his court would lead one to believe that if you were hit in an accident, you should regain consciousness as quickly as possible, look around you, find the nearest solvent person, sue him and collect. There would be no need for courts and judges, if such a rule applied.

Still another factor contributing to the cost of malpractice insurance is the cost of settlements, and the verdicts are for larger sums than formerly prevailed. Judges, as well as lawyers, take into account, as the courts have, the diminished purchasing value of the dollar.

Doctors now find the cost of their malpractice insurance to be a serious financial burden. To suggest liberalization by drastic modifications of the present statute of limitations and rules of liability in these cases would effect no good purpose and would assist towards pricing this kind of insurance right out of the market.

Very often in the trial of these cases, we are faced with a claim that an operation went beyond what was agreed to and unauthorized procedures were performed. There was an opinion rendered by Mr. Justice Samuel M. Gold on February 9th, 1955, in the case of *Gisnet v. Steinhardt,* (unreported), Supreme Court, New York County, where, in granting a motion for a directed verdict, he held: "Plaintiff consented to an operation in writing, and the express language of the authority to operate, signed by the plaintiff, gave permission to the attending physician to perform whatever operation may be decided necessary or advisable in the judgment of her attending physician. Even in the absence of such a written authorization under the law where a patient consents to an operation for the relief of a condition from which she is suffering, she will be assumed to have authorized her surgeon to perform such operation as may be required by the condition which he finds. And when during the course of the operation it appears to the surgeon to be necessary to extend the scope of the operation beyond what was originally contemplated consent to such extension will be implied."

It may be thought that the number of suits against doctors recognized by the American Boards or the American College of Surgeons or Physicians are few. But these cases do not strike just those members of the profession who do not have

ratings in their specialties. A run-off of 100 consecutive cases developed that 47 of the doctors involved had membership in either the College of Surgeons or were diplomates of their particular specialty or both. It is to be remembered that in a profession, the vast majority of the members of which are fine, honorable, decent, hard-working practioners, there is the inevitable mistake which may cause a tragedy. It is comforting to the great majority of the profession to have malpractice insurance available for their protection and, one may add, for the patient as well.

Mistakes happen but they are always made easier to deal with by fair, human, decent treatment of the patient. Most patients first discuss their grievances with their own doctor and if he is tactful with them, they will still deal with him or his representative. Losing one's temper only drives the patient to a lawyer.

Administration of Safety Responsibility Laws

E. A. COWIE*
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PREVIOUS reports have dealt largely with the legal aspects of safety responsibility laws and their impact on insurance coverages. We felt that a factual report on the practical accomplishments of the various laws might be timely. This, then, is no legal tome but rather a "State of the Nation" report.

We had some sort of a notion that the success or failure of existing laws probably varied about in direct proportion to the degree of enforcement. With that point very much in mind, a survey of several representative states was attempted. In some instances, the information is semi-official; in others, it represents but the opinion of interested citizenry.

Any consideration of what has been accomplished by the laws probably should start with a statement of their objectives. Basically, we think the desire has been to reduce the number of uncompensated motor vehicle injuries and deaths, to increase the number of insured or financially responsible motorists and conversely to remove from the highways those who cannot measure up to present and future obligations. There are some who would add the additional expectation of reducing the number of accidents. We are concerned you see with the "security" aspects of the laws and not with the criminal aspects.

Generally, we know that the typical security type law provides for the filing of accident reports with the motor vehicle department by both parties to an accident involving bodily injury or property damage above a certain amount. If, within a prescribed period, evidence of financial security in approved form is not forthcoming, the registration and driving license of such persons are lifted. In theory at least, offenders will be removed from the highways within 60 to 90 days following the accident.

It would not be fair to gloss over the difficulties that confront motor vehicle departments or safety responsibility divisions, as they are commonly called, when they are suddenly faced with the task of administering such a law. Some legislatures apparently forget to provide needed funds. In some states, undoubtedly, the effective date caught the motor vehicle departments unprepared. We have reviewed an interesting procedural guide recently prepared by the American Association of Motor Vehicle Administrators that should prove very helpful to many administrators. It can be said, we think, that as experience is gained, many of the administrators' difficulties disappear.

One test of progress would certainly be the number of insured automobiles before and after. This has to be estimated mainly from accident report returns, but they should be a fairly reliable guide. Inquiries in some thirteen states where official or reliable estimates could be obtained show in every case a substantial increase in the number of insured operators and that increase continuing as the law seasons. Bear in mind that in some of these states the law has been in operation but a year or two.

The lowest percentage of insured auto-

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mobiles in any one of these states is 42% (an increase, however, in three years from 14%) while the highest is 96%. The average increase appears to be from about 40% insured, before passage of the law, to 70%. In the two states with the oldest laws, the percentage is 95% and 96% respectively. It seems safe to conclude then that these laws are very definitely increasing the number of insured vehicles and that as time goes by the number may be expected to approach the absolute. The New York Motor Vehicle Department has this to say in its 1953 report, "In conclusion, New York State motorists continue to show that they appreciate the value of this type of legislation; they have evidenced it through their co-operation to promote the most effective administration. It is the contention of this administration that the Safety Responsibility Law has reduced the number of uninsured to a relatively small percentage, which, applied to the total number of registered vehicles, would nevertheless indicate some 200,000 to 400,000 uninsured. . . ."

Next, as to the number of financially irresponsible motorists actually removed from the highways: All report increasing numbers, but the exact comparison is a little harder to obtain. One state reports revocations for financial security reasons in 1952, the first year of the law, of 9,603; in 1953—13,953; in ten months of 1954—20,014. This would seem to indicate that enforcement improves with age for in another state with a well seasoned law the suspensions referred for enforcement in 1952 were 77,363 against 77,551 in 1953.

Another test should be the results of the security requirements of the laws . . . the extent to which they have produced financial relief. The New York report for 1953 shows this interesting fact: ". . . since 1942, deposits of security numbering approximately 85,000 in the amount of $13,759,000 have been received from uninsured motorists." Georgia, with a relatively new law, reports this: Security deposited in 1951—$7,884.83; in 1952—$48,606.61; in 1953—$81,041.43 . . . in other words, as the law seasons, the results improve. New Jersey reports security deposits in 1953 of $366,174. Bear in mind these are deposits for future judgments only. The amounts paid voluntarily by uninsured motorists to retain their driving privileges are probably much larger. We are indebted to the New Jersey annual report for this information:

"Payments, which might otherwise not have been made, enforced against uninsured motorists by reason of the Security Responsibility Law, from its inception, April 1, 1953 to October 31, 1954."

By Release (agreed between the parties)	$1,827,248.00
Installment Payment	323,319.00
Judgments Paid From Deposits	37,096.00
Judgments Paid After Suspension	1,040,126.49
Total Payments	$3,227,789.49

There seems to be no credible evidence that the number of accidents has been reduced. There are too many variables, such as, the increase in number of automobiles, the increase in mileage, safety campaigns, etc., to permit an exact analysis. On the other hand, neither is there any evidence that the presence of insurance increases accidents by promoting indifference.

Our information on the degree of enforcement in the various states, as was said earlier, comes largely from opinion evidence. Official reports could not be expected to be very revealing in this respect though some have admitted they were handicapped by a lack of funds. This quote from a southern newspaper is somewhat illuminating: "Administration of the Responsibility Act has not caused quite the upheaval that was once feared, but the Revenue Department would still like funds with which to administer it. They were given none by the 1953 legislature which passed the act."

We found very little evidence of "fixing" or political pressure. To the contrary, there was ample evidence of a wholehearted attempt by motor vehicle departments to make the law work. Whatever shortcomings seemed to exist in enforcing practices apparently stem from unfamiliarity with a complex situation, or from a shortage of competent help. It could perhaps be guessed that in the states where enforcement appears weakest, the percentage of insured automobiles is likewise low.

Some enforcement problems seem to stem from poor co-ordination between various agencies entrusted with enforcement of the law. Sometimes the job of picking up plates and licenses is left to the state police or highway patrol. This is a thankless task at best and it is easy to see

why there are problems. Again, it is noted, however, that the problems lessen materially as experience is gained and the clerical errors disappear . . . yes, clerical errors are a factor because we hear of occasional cases where the agency trying to pick up the plates is met with proof that the owner has already filed proof of responsibility.

To those who would say that the compulsory insurance approach would avoid all these problems, we point out that the purpose of Security Type Safety Responsibility Laws is twofold. Undeniably, it is hoped, and we think proved, that the number of insured cars will be materially increased, but even more important is the policing effect of such laws on careless drivers. This excerpt from the New York 1952 report is significant:

> "Certainly, the dominant consideration should not be to permit persons to continue to drive with only the assurance that they are financially responsible. It is the intent of the law that persons who disregard all the rules of safety and common sense should be removed from the highways."

It seems clear that the duty of proving financial responsibility for the present and future, as fastened on all uninsured drivers, including non-residents, is apt to prove much more effective than the situation where it is taken for granted that all resident owners are insured. Furthermore, in the one state to which we can look for experience, it is commonly understood that the average limits carried by insureds are substantially less than those carried in other states where there is no immediate compulsion . . . and there is still no solution of the non-resident motorist.

This is not intended as a presentation of the merits of voluntary versus compulsory insurance, but the controversial issue cannot be entirely ignored. The point is that the safety responsibility approach deserves at least a reasonable trial period before the take off into an experiment which has proved unsatisfactory in the one state that has tried it, or into some other unknown and untried venture.

It would be our conclusion then that several years of operation under such laws is essential to maximum efficiency. The public must be educated and those who administer the law must likewise learn through experience. The trend is heartening, however, and it appears inescapable that, if property enforced, the security type laws can and will solve the problem of the financially irresponsible motorist.

Federal Trade Commission Jurisdiction?

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IN May of 1866, Sam Paul of Petersburg, Virginia, was appointed agent for several New York fire insurance companies. He applied to the proper officer of the district for an agent's license, and agreed to comply with the law, except the requirement that bonds in amounts ranging from $30,000 to $50,000 be deposited with the Treasurer of the State of Virginia as required of foreign companies. Sam (and his New York companies) not making such deposit, his agent's license was refused. Sam Paul went ahead anyway and sold insurance without a license, whereupon he was promptly indicted and convicted and sentenced to pay a fine of $50.00.

Sam Paul was a fighter and he fought (backed, no doubt, by the New York companies) all the way to the United States Supreme Court. Thereby Sam Paul started a series of events in the regulation of the insurance industry not yet terminated and with no ending indicated in the discernible future.

The decision of the U. S. Supreme Court in the famous case of *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357, decided that insurance was not commerce, hence could not be interstate commerce; therefore, could be regulated in all of its aspects by the State of Virginia, even to the extent of requiring the deposit of funds of some New York insurance companies.

For seventy-five years, such was the estab-

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lished law—most people thought it was permanent. However, the United States Supreme Court has the right to change its mind, and did; also interpretation of the commerce clause changed, so the high court in the now famous *Southeastern Underwriters* case, 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440, decided that the business of insurance is commerce. It logically followed that when conducted across state lines, it is interstate commerce and, therefore, subject to federal law.

This decision was quite a shock, both to state regulatory authority and to the industry. An All-industry Committee was formed, which worked with a corresponding committee of the National Association of Insurance Commissioners. The demise of *Paul v. Virginia* was the subject of much oratory, and much deep thinking. In lighter moments some mature lawyers would speak somewhat tenderly of Paul *and* Virginia remembering possibly that the whole thing started in the month of May. The seventy-five year honeymoon (of state regulation and industry) had ended and the proverbial mother-in-law (federal intervention) was at least potentially interfering.

Since the existing system of state regulation had become so well established, it appeared to be "in the public interest" that such state regulation (and taxation) should continue, and Congress so declared in enacting the McCarran Act, Public Law 15, in 1945. However, it was not quite that simple. Congress added that it excluded federal regulation or control "to the extent (only) that such business is not regulated by state law."

As a practical matter, for a period of several months state regulation went its own way and scored a couple of United States Supreme Court victories, one in the so-called Robertson case[1] from California, in which it was held that the power to license and regulate insurance agents remained solely with the state of California, and the Benjamin case[2] in which the exclusive power of the state to tax insurance premiums was reaffirmed.

State regulation was raised as a defense in *United States v. Sylvanus,* 192 F. 2d 96, in which the Post Office Department had instigated a prosecution for fraudulent use of the mails, resulting in a conviction in Federal Court in Illinois. Defendant urged that the indictment should be missed on the ground that the conduct of the insurance business is regulated exclusively by state law and consequently, under Public Law 15, the federal statutes did not apply. The court held that fraudulent statements are not part of the insurance business but are rather an unlawful scheme to defraud the public; and since fraudulent use of the mail had occurred, defendant was properly convicted. The court said:

> "It is immaterial that the fraudulent plan itself is outside the jurisdiction of Congress. *Badders v. U. S.,* 240 U.S. 391. Or that the scheme charged involved a transaction forbidden by the laws of the State. *O'Hara v. U.S.,* 129 F. 551."

In the meantime, the Federal Trade Commission at Washington had been conducting a survey and eventually compiled a report showing the scope and extent of state regulation of insurance. It felt that some gaps in state regulation existed.

Eventually, the FTC called a Trade Practice Conference for the purpose of establishing rules for advertising governing so-called mail order companies, at the request of an association of mail order companies. Eventually, rules were promulgated in 1950 and the mail order companies operated under them for a period of several years.

Then, more than a year ago, a series of events started, the end of which cannot be foreseen. Certain congressional hearings were held relating to health and accident insurance, and these were followed rather quickly by an announcment from the Federal Trade Commission that it proposed to investigate advertising and promotional material of the industry.

The companies promptly responded to an appeal made by FTC for cooperation by forwarding to it specimens of advertising and sales promotion material and related policy forms; following which nothing was heard from FTC for several months until in the fall of 1954 complaints were filed against seventeen companies alleging the use of misleading advertising and asking for cease and desist orders.

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[1] *Robertson v. California,* 328 U.S. 440, 66 S. Ct. 1160, 90 L. Ed. 1366.

[2] *Prudential Insurance Company v. Benjamin,* 328 U.S. 408, 66 S. Ct. 1142, 90 L. Ed. 1342.

Respondent companies immediately challenged FTC jurisdiction saying they were regulated by one or more states. In addition a number of companies defended their advertising on the merits saying it was truthful and not misleading. Other companies said the practices complained of had ceased and that the issues were moot.

A pre-trial conference was held by the Federal Trade Commission early in December, 1954, presided over by FTC examiners and guided by counsel for the FTC. Sixteen respondent companies were represented. Counsel for the FTC stated in open hearing the grounds upon which FTC claimed juurisdiction, these grounds varying in the different cases. In some cases, companies were licensed in only one state and did business by mail in most, if not all, of the other states. Other companies were licensed in a number of states, but not all, and did some business in all or practically all of the states by way of renewals. As to these two classes of companies, FTC counsel stated that the fact that business was conducted in one or more states where the company was not licensed, gave FTC jurisdiction.

A third category involved companies licensed in all of the states, and as to these companies, FTC counsel alleged jurisdiction for the reason that a number of the states did not even attempt to regulate advertising and promotional practices.

Counsel for FTC stated that it was not concerned with quality or adequacy of state regulation, but was concerned only as to whether or not the state had a regulatory law. However, it has later been noted that some utterances of at least a semi-official character have emanated from FTC indicating its interest in adequacy or quality of state regulation. In the forefront of the jurisdictional battle has been a company licensed only in New York, its state of domicile, and one other state. This company prepares and distributes all of its advertising material from its office in the state of New York. It has no agents and conducts all of its business thru the mails.

The Federal Trade Commission Act, 15 U.S.C.A., Sections 41-77, at Section 45 provides in part as follows:

> "(a) Unfair methods of competition in commerce and unfair acts or practices in commerce are declared unlawful.
>
> "The Commission is empowered and directed to prevent persons, partnerships or corporations * * * from using methods of competition in commerce and unfair or deceptive acts or practices in commerce."

As previously indicated, Public Law 15 excluded the operation of the above quoted provisions "to the extent that such (insurance) business is not regulated by state law."

This New York company has vigorously contended that not only does that state have comprehensive regulatory statutes and procedures, but that New York has extra-territorial jurisdiction which it actually exercises in many ways.

In *Hoopeston Canning Co. v. Cullen,* 318 U.S. 313, 63 S. Ct. 602, 87 L. Ed. 777, involving the New York Insurance Law applicable to foreign companies, the court said:

> "These regulations cannot be attacked merely because they affect business activities which are carried on outside the state. Of necessity any regulations affecting the solvency of those doing an insurance business within the state must have some effect upon the business practices of the same company outside the state. The power New York may exercise to regulate domestic insurance associations may be applied to foreign associations which New York permits to conduct the same kind of business. * * * Where as here the state has full power to prescribe the form of contract, the terms of protection of the insured and the type of reserved funds the mere fact that said action may have repercussions beyond state lines is of no judicial significance."

In *Prudential v. Benjamin,* supra, the court said:

> "At the same time, on the rationalization that insurance was not commerce, yet was business affected with a vast public interest the states developed compresensive regulations and taxing systems * * *. States grappling with nation-wide but nationally unregulated business inevitably exerted their powers to limits and in ways not sought generally to be applied to other business held to be within the reach of the commerce clause's implied prohibition. Obvious

and widespread examples are furnished in broad and detailed licensing provisions, for the doing of business within the states * * *. Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued state regulation and taxation is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects. Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes enacted; and of the further fact that many if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems notwithstanding these variations * * *. Congress intended to declare and in effect declared that uniformity of regulation and of taxation are not required in reference to the business of insurance by the national public interest except in the specific respects otherwise expressly provided for."

In *North Little Rock Transportation Co. v. Casualty Reciprocal Exchange,* 181 F. 2d 174, the court said:

"The purpose of the McCarran Act was to permit the states to continue the regulation of the business of insurance unhampered, to the extent provided by the Act, by federal legislation relating to interstate commerce. See Prudential Insurance Co. v. Benjamin, supra."

Those who plan to fight FTC jurisdiction, even to the U.S. Supreme Court, if necessary, contend that Public Law 15 will be strictly construed against FTC (or any federal agency). They rely on such cases as—

Townsend v. Yeomans, 301 U.S. 441, 57 S. Ct. 842, 81 L. Ed. 210, holding:

"The intent to supersede the exercise by the state of its police power as to matters not covered by the federal legislation is not to be implied unless the latter fairly interpreted is in actual conflict with the state law."

Florida v. U.S., 282 U.S. 194, 51 S. Ct. 119, 75 L. Ed. 291, holding:

"The propriety of the exertion of the (federal) authority must be tested by its relation to the purpose of the grant and with suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power the justification of the exercise of the federal power must clearly appear."

It should be remembered that few, if any, of the states have as broad and comprehensive regulatory powers as exist in New York. Will there be a different rule in instance of a company domiciled in New York state as compared to companies domiciled in states which attempt no extra-territorial jurisdiction?

If and when *all* of the states have enacted the Model Fair Trade Practice Law, will federal authority be completely ousted from jurisdiction to regulate health and accident advertising, on the theory that regulation by state law has been established within the meaning of Public Law 15?

Once there is universal enactment of this law, will adequacy or quality of regulation thereunder be considered?

Is the answer for industry to seek an FTC Trade Practice Conference with resulting advertising rules setting up more definite standards than anything that has been attempted in the past—more spelling out and fewer generalities? (Needless to say, a better job would be required than accomplished in the 1950 FTC mail order rules).

Can and will FTC devise a technique whereby respondent companies, in proper cases, may enter into some sort of compromise stipulation which will not taint them

with the stigma of guilt and still remove the faults alleged in the FTC complaints? (One company as of this writing has consented to a general FTC cease and desist order.)

Can a technique be devised that will combine some type of compromise stipulation with FTC simultaneously merged into an FTC Trade Practice Conference?

Most of the states now have rather definite patterns of regulation, such as licensing of companies and agents, auditing of annual statements and collection of premium taxes, approval of policy forms and in some instances of rates (there being no rate regulation of health and accident insurance), examination of companies and other very important activities. However, few state insurance departments at this time have the equivalent of FTC conferences (which are sometimes formal and sometimes informal). Some authorities believe that the matter of regulation of advertising lends itself to the conference method. In many activities, insurance and otherwise, everything can be written down in a rule book and matters are settled once and for all. Not so, however, in advertising and promotional practices.

Briefly, some of the FTC complaints accused the respondent companies of overstating and overemphasizing benefits, failing to advise the public of policy limitations, exceptions, etc.; leading the public to believe policies are renewable on payment of premium and not subject to cancellation or a decision on the part of the company not to renew; and leading the public to believe a very low premium would purchase elaborate coverage, when in fact, wide and comprehensive benefits call for a substantial premium. To cure these alleged evils, the FTC complaints propose cease and desist orders phrased in general language. However, the interpretation of these proposed orders is bound to lead to questions of interpretations which might naturally lend themselves to the conference method of solution. Also, many industry leaders believe that the conference approach may serve to emphasize the public relations aspect of this involved subject, feeling that legalistic considerations should be secondary.

Owing to the fact that the writer is rather closely identified with the Health and Accident insurance industry, I would be remiss if this article did not close on an optimistic note. It is well known that this segment of the insurance industry has grown by leaps and bounds in the last few years. It is increasing daily its facilities for public service. Most of the business is conducted on a very high plane to the entire satisfaction of policy-holders. Internally, this industry is voluntarily solving its problems. Witness the adoption of the Ethical Standards for Advertising Individually Underwritten Accident and Health Insurance adopted by the Health and Accident Underwriters Conference at New Orleans in May of 1954. These standards have proven workable and successful. Regardless of how the issue of FTC v. State jurisdiction is finally decided, the purpose of the vast majority in this industry will be to ethically formulate advertising and solicitation material in an attractive, stimulating and forceful manner such as to attract the interest of the public and hold that interest and eventually result in a sale of the insurance contract. Scores of companies are operating successfully under these standards.

"It is a hallmark of distinction to be invited to write an article for the Journal of the International Association of Insurance Counsel. If and when any of you are so invited, I hope you will rise to the occasion. I know that you are busy men, but by that very same fact you somewhere in the wide reaches of your practice have had to explore some fields of law perhaps more thoroughly than any of our other members. If so, you owe it to your brethren in the Association to prepare adequate discussion of those particular subjects."

President Stanley C. Morris
Coronado, California, July 9, 1955

Problem of Surety in Completing Contract Over Protest of Principal

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CONSTRUCTION contracts, in practically all instances, contain a provision to the effect that if, in the opinion of the owner's engineer, the contractor is not (among other things) prosecuting the work with promptness and diligence, or is neglecting to furnish suitable materials and sufficiently skilled labor, or if the work is being prosecuted improperly, then the owner shall have the right to declare a default, and terminate the right of the contractor to proceed. Thus, in such matters, the owner is clothed with wide discretion. Consequently, while it is not within the purview of this paper to consider the owner's rights, as a general statement it might be said that on the basis of the usual contractual provisions any declaration of default would appear to be effective in the absence of bad faith or such gross error as to amount to fraud.

The contractor, of course, enters into the contract with the owner with full knowledge of the terms thereof, including the conditions under which the owner has the right to declare a default and call upon the surety to complete. In spite of this, there arise cases where a contractor will, in all good faith, question the action of an owner in declaring a default and will take the position that the surety should not perform under its bond, notifying it that should it do so it will be at its own peril. When such a situation arises, the surety is faced with a dilemma akin to that of the ancient traveller Ulysses when confronted with the problem of Scylla and Charybdis. Having written a bond providing for the performance of the contract, and the contract containing a provision as herein discussed, if there has been no known breach by the owner, it is urged by a sense of duty to arrange for the completion of the work. At the same time, it feels the necessity for restraint out of consideration for the contractor. What then are its rights and what should be its decision?

The surety must, of practical necessity, and after investigation and consideration of the respective merits, base its decision on its own factual appraisal. In so doing, it is reasonable to assume that, among other things, full thought and consideration will be given to (a) the contractor's performance up to the date of the declaration, (b) whether the owner committed any substantial breach of the contract, (c) both the surety's and the contractor's contractual duty to the owner, (d) the existing equities, and (e) the economics of the surety arranging for completion as against leaving completion to the owner, and allowing the issues to be later decided. Space does not permit a detailed discussion of all factors that might lead to a decision, the purpose here being only to set forth the legal basis upon which the surety, after considering the matter, may exercise freedom in reaching a conclusion.

The surety's rights are founded upon the indemnity agreement taken by it at the time the bond was written and upon the basic doctrine of indemnity inherent in the principal and surety relationship. The common law rule is:—

> "In the absence of an express agreement, there is, in a relationship of principal and surety, an implied contract that the principal will indemnify, or reimburse, the surety for any payment the latter may make to the creditors or loss it may sustain in compliance with the contract of suretyship and save the surety harmless."[1]

This seemingly sweeping rule no doubt sufficed for the reasonably simple commercial transactions of older days. The economic changes of the last eighty years, culminating in an industrial society in the Unit-

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[1]72 C.J.S. 777.

ed States, resulted, however, in a different concept of suretyship and gave impetus at the turn of the 19th Century to Corporate Suretyship. This industry, in its pioneer days found the common law rule insufficient for all its purposes and therefore formalized it and made it more explicit by the use of a form commonly referred to as an "indemnity agreement", which agreement, together with the rule, is today the foundation upon which its rights, as discussed herein, rest. Space forbids the reprint of any one form in full, but, despite minor differences in phraseology, the forms of various surety companies are, in essence, similar.

The advent of corporate suretyship and, along with it, formal indemnity agreements, had no effect on the common law rule, other than to supplement it.[3] It is submitted, however, that the writers of some of the earlier cases failed to appreciate that a written agreement went considerably beyond that rule. Compare with the common law rule the following language taken, in part, from an indemnity agreement:

> *"Second.* The undersigned will at all times indemnify and keep indemnified the Company, and hold and save it harmless from and against any and all liability for damages, loss, costs, charges and expenses of whatever kind or nature (including counsel and attorney's fees, which the Company shall or may, at any time, sustain or incur by reason or in consequence of having executed the bond (s) herein applied for, or any and all other bonds executed for us or at our instance and request; and will pay over, reimburse and make good to the Company, its successors and assigns, all money which the Company or its representatives shall pay or cause to be paid, or become liable to pay, by reason of the execution of any such instruments, or in connection with any litigation, investigation or other matters connected therewith, such payment to be made to the Company as soon as it shall have become liable therefor, whether the Company shall have paid out such sum, or any part thereof, or not. That in any accounting which may be had between the undersigned and the Company, the Company shall be entitled to credit for any and all disbursements in and about the matters herein contemplated, made by it in good faith under the belief that it is or was liable for the sums and amounts so disbursed, or that it was necessary or expedient to make such disbursements, whether such liability, necessity or expediency existed or not, and vouchers or other evidence of such disbursements shall be taken as conclusive evidence against the undersigned of the fact and extent of the undersigned's liability to the Company."

Still, in 1913, the Second Circuit, after considering an indemnity agreement, not unlike that above quoted, stated that:—"the indemnity agreement adds little to the common law obligation, except insofar as it relates to the establishment of liability".[4]

A more discerning court in Arkansas, in 1919,[5] observed that the liability of the surety was no greater than that of its principal and if the principal was not liable, the surety would be in the status of a volunteer if it made payment, but then clarified its statement by saying:—"Rule (Common Law) may be modified by contract and the indemnity provision in the application made the principal liable for any payment made in good faith (by the Surety) in absolving itself from liability in connection with any claim made against it".

This distinction was observed and echoed again twenty years later in Missouri,[6] and thus the courts started the recognition of the efficacy of formal indemnity agreements, and their supplementation of the common law rule.

This gradual recognition of the validity of formal indemnity agreements brought with it the surety's right for freedom of action. It need not be convinced that it is charged with absolute legal liability before complying with an owner's (obligee under the bond) demands, for it has been decided:—

> "***there is a distinction between a claim which is invalid and one which the indemnitor merely claims to be invalid, or to which he claims a defense. In the latter case the provisions of the indemnity contract between the parties govern the right or necessity of litigat-

[3] *Phelps v. Dawson*, 97 F. 2d 339.
Bessinger v. National Surety Co., 35 S.E. 2d 658.

[4] *American Bonding Co. v. Alcatraz Construction Co.*, 202 F. 483.

[5] *Peay v. Southern Surety Co.*, 216 S.W. 722.

[6] *Central Surety & Ins. Corp. v. Hinton*, 130 S.W. 2d 235.

ing the claim before the indemnitee is entitled to reimbursement."[6]

In Pennsylvania the rule is stated:—"nor is he (surety) bound to subject himself to the risk of waiting until the creditor has a cause of action. He may, in short, consult his own safety and resort to any measure calculated to assure him of that which does not involve a wanton sacrifice of the interest of his principal".[7]

The Fifth Circuit put it this way:—"From the foregoing (indemnity provision in the application), it follows that the ultimate liability of the appellant was not a condition precedent to its right to recover on the indemnity contract".[8]

The Rhode Island Court, after a discussion in detail of the indemnity agreement, stated:—"***we are confronted with the well nigh inescapable conclusion that the parties to this bond have lodged in the indemnitee a discretion limited only by the bounds of fraud".[9]

In varying language and under different circumstances, various courts have followed the basic principles above described. Texas,[10] Wisconsin,[11] North Carolina,[12], New York,[13] and Alabama.[14]

While not involving suretyship, the Kentucky Courts have approved the underlying principles involved and perhaps, to some extent, gone a bit further.[15]

In addition, statutory provisions are not to be ignored. Space permits but a fleeting reference to this phase of the question, but attention is directed to the law of Montana. It flatly provides:—"If a surety satisfies a principal's obligations, or any part thereof, whether with or without legal proceedings, the principal is bound to reimburse what the surety has discharged".[16] It is true that this section has not been considered, to the writer's knowledge, in a case involving a compensated surety. However, in such other cases where it has been considered, the interpretation placed upon it seems to indicate that it is so clear as to need no construction. Its language has been held to be explicit and to mean exactly what it says. While, in considering it, general common law principles have been discussed by the court, it has been the statutory provisions that have controlled and the issue has been foreclosed in favor of the surety.[17] In view of the obvious language of the statute and its construction to date, it is reasonable to assume that it would be applied the same way in the event of a problem involving a corporate surety.

It is thus established that the right of a surety to arrange for completion of a contract over the protest of its principal (the contractor) is founded upon the common law right of indemnity, statute and formal indemnity agreements. Arranging for the completion of a contract is one way for a surety to satisfy its principal's obligation and to meet its own obligation under its bond, just as paying damages because of failure of its principal to do so would be another. When in the exercise of good faith it adopts this procedure, it is protected without having placed upon it the burden of first having to have its absolute legal liability determined.

On its face it might be said that upon a contract being declared in default, a surety, in the absence of some known breach, bad faith or error by the owner would, without more, be acting in good faith in arranging for the completion of the work and thus meeting its obligation under its bond. As an owner is given the right to declare the default, a surety would seem to be justified in accepting such action taken by it, without having to be placed in the position of determining who is right in the dispute. However, experience has shown that no surety accepts lightly its position of trust and, therefore, both the owner and the contractor while not always agreeing with the decision reached, may rest assured that the respective factors have been carefully weighed and then action taken only on the basis of what is felt to be reasonably proper in light of the overall picture.

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[6] *National Surety Co. v. Peoples Milling Co.*, 57 F. Supp. 281.

[7] *Royal Indemnity Co. v. Gunzburg*, 173 A. 438.

[8] *U. S. F. & G. v. Jones*, 87 F. 2d 346.

[9] *Mass. Bonding Co. v. Gautieri*, 30 A. 2d 848.

[10] *Central Surety & Ins. Co. v. Martin*, 224 S.W. 2d 773.

Indemnity Ins. Co. of North America v. McMillan, 153 S.W. 2d 264.

[11] *U. S. F. & G. v. Pullen*, 283 N.W. 462.

[12] *Boney v. Central Mutual Insurance Co. of Chicago*, 197 S.E. 122.

[13] *Glens Falls Indemnity Co. v. Carobine*, 36 N.Y.S. 2d 253.

Peerless Casualty Co. v. Sawitz & Simon, 23 N.Y.S. 2d 71.

[14] *Singleton v. U. S. F. & G.*, 70 S. 169.

[15] *Lutton Mining Co. v. Louisville & N. R. Co.*, 123, S.W. 2d 1055.

[16] *Rev. Code Montana*, 1947, Chap. 5, Section 50-501-508.

[17] *Kipp v. Paul*, 103 P. 2d 675 & 678.

Valuation in Convenience Warehouse Receipt Bailment

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OCCASIONALLY everyone must turn his hat, coat, car, etc., over to another under a variety of circumstances, and the totality of such transactions represents a large business and a substantial insurance risk factor, both casualty and marine. The restauranteur provides a hat-check room, the fur merchant provides air-conditioned fur storage "vaults", the department store operates a furniture warehouse and the railroad and motor coach lines provide baggage-check service. Such a bailment might be called "convenience bailment" designed to enable members of the public temporarily to lay aside items of personalty which are customarily in continuous use. It is the casual bailment of non-business property by the public to bailees whose principal business is not that of warehousing.

Legally, the simplest incident to such transactions is identity. A check is attached to the property and its stub is given to the owner. The matching check and stub identify the property for the owner when he claims it, and the stub serves as evidence of the bailment in the event of loss. Identity is a matter of proof, and controversies respecting the fact of bailment or claims that the wrong property was returned, are resolved by evidence.

More difficult is the separate identification of the various types of transaction in convenience bailment. The courts have treated them differently without giving them distinguishing names. As to valuation such transactions fall into four groups:

1. "Hat-check" bailment
2. Space rental
3. Baggage-check tariff bailment
4. Warehouse receipt bailment

The first three of the four items set out above are mentioned strictly for the purpose of delineation. It is necessary to distinguish them to bring our subject into sharp focus.

"Hat-check" bailment involves the exchange of an *identity check* for an item of personal property. There is no written contract, and nothing that may appear in writing on the face of the check is binding upon the bailor unless that writing is called to his attention[1]. The contract is a bailment contract implied in the common law (or set out by statute or ordinance), and it is in no wise subject to unilateral alteration by the bailee. The terms of the implied contract cannot be varied without express agreement of both parties[2]. The value of the bailed property is based on its actual value.

Space rental is not bailment. The distinction is factual and often very close. If one leaves a car at a public garage, taking the ignition key so that it cannot be moved about by the garage-man, he has simply rented space[3]. The burden of establishing negligent loss of car or contents is likely to be more difficult for the owner in space rental than in bailment. As to valuation his approach is the same as in the hat-check type. It is a matter of evidence of the actual value[3].

The baggage-check tariff bailment differs markedly from the above two. It is a "written" contract, a part of whose terms is set out on the face of the check and the balance is found in the published tariff of the bailee-carrier. This special bailment derives from rail and motor carrier legislation which requires the publication of rates by carriers along with the terms and conditions under which transportation will be conducted. When a baggage tariff is published pursuant to statute, its rates, terms and conditions are binding upon all bailors of baggage doing business with the carrier[3].

Of particular significance here is the matter of the value of the bailed baggage. In the event of valid claim for loss, the value of what was lost must be fixed. Public carriers employ an agreed or stated value device. A schedule of rates, graduated in some proportion to "agreed" or "stated" value is set out in the carrier's tariff. The bailor, in checking his bag-

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[1] 6 Am. Jur. 297, Bailments, Sec. 179.
[2] *Ins. Co. v. Constantine* (1944) 144 O. S. 275, 58 N. E. 2d 653.

gage through, fixes the value and pays at the applicable rate. Often the carrier's employee prepares the ticket, and he usually sets the value at the tariff minimum, charging the minimum rate and saying nothing about value to the bailor. The ticket having been prepared in the bailor's presence, is then handed to him, and it bears on its face the value thus set. The bailor is bound by this value in the event of loss[3].

The above points up the significant similarity between baggage-check bailments and warehouse receipt bailments. In both, the bailor can be bound by a valuation of which he had no actual knowledge and which may be a trifle as compared with the actual value of the property. As to both types of bailment, the major controversies have centered around valuation.

The Uniform Warehouse Receipts Act makes no provision respecting valuation. But the Act and the common law of receipts combine to enable the warehouseman to set the value of bailed property without express agreement by the bailor.

At the common law, a receipt occupies a unique position. It is a written contract though not signed nor its terms affirmatively assented to by the party receiving it. Generally, if a receipt is for money or property and the same is physically handed over in exchange for the money or property, and the written terms of the receipt purport to contain the entire agreement between the parties with respect to the money or property, it is an inviolable contract whose terms cannot be varied by parole evidence[4]. The assent to the terms of the receipt by the party to whom it is given is implied from his acceptance of it without complaint. This is so whether or not he reads the receipt or understands that it purports to function as a written contract[4].

The above applies to warehouse receipts as well as to all others. Note here that the hat-check and the space-rental check are not receipts but have been treated by the courts as being mere identification tokens. At this point it is important to notice also another not-too-well-defined distinction which seems to pervade the cases. There is a difference between checking and storage. The same item may be "stored" or it may be "checked", and the issuance of a "receipt" for a checked item does not convert the checking into storage, nor the token into a contract. It is the nature of the transaction that makes this distinction but the courts have not been helpful in defining it. The line of definition appears to run between the situation where the bailment is temporary and is consistent with the continuous use of the property by its owner, and the situation where the continuity of use is broken by a relatively longer period of bailment.

An automobile in continuous use may be "checked" at a parking garage while the owner is shopping. But the owner may become ill and "store" it at the same garage until he can again use it. An entertainer may "check" his wardrobe at a hotel during his local appearance, or he may "store" it there while he goes on tour to try out another act with a different wardrobe.

The significance of the distinction between "storage" and "checking" as regards valuation will become apparent.

In all types of bailment, bailees have repeatedly sought to immunize themselves from liability for loss, with obvious results. It is well settled as a firm principle of law based in public policy that one cannot by contract acquire exemption in advance from liability for failure to exercise the required degree of care.

Liability for the full value of the property which the bailee is unable to return to the bailor imposes a considerable risk upon the bailee. He may have no adequate means of protecting himself against fraudulent claims as to the identity and value of the missing property, nor against unknowingly assuming the risk of loss of highly valuable property. The remedy has been that the charge has been proportioned to the risk. The higher the value of the property, the higher the storage charge. The value is set by the owner and he pays the charge accordingly.

Claims that valuation by this means constitutes exemption from liability for failure to exercise care generally have been rejected by the courts. The Supreme Court of Ohio stated it thus in *Warehouse Co. v. Pickering*, 114 O. S. 76, 151 N. E. 37, 142 A.L.R. 768:

> "(Such methods) • • • do not constitute an exemption from liability for

[3] *Boston & M. R. Co. v. Hooker* (1914) 233 U. S. 97, 58 L. Ed. 868, 34 S. Ct. 526.

[4] *Stone v. Vance et al.*, (1833) 6 Ohio 246, 100 A.L.R. 20n.

want of due care, but constitute a reasonable and enforcable method of fixing a due proportion between the amount for which the warehouseman becomes responsible and the charges collected by him, and for protecting the warehouseman against extravagant valuations in case of loss."

With the above statement most courts agree. It is when the receipt device is coupled with the above valuation method that the difficulty arises.

The Uniform Warehouse Receipts Act defines the "warehouseman" as: "a person lawfully engaged in the business of storing goods for profit". This broad definition appears to include all bailees for profit. But the courts have excluded the casual hat-check type bailment on the ground that checking is not storing, without actually saying so. Other bailees are excluded in various jurisdictions because of other statutes relating to certain different types of bailment. But we can find no case wherein the "convenience" type bailment (as defined herein) has been excluded from the operation of the Act simply because it differs from the "commercial" type bailment.

Beyond question the Uniform Warehouse Receipts Act was drafted for the purpose of facilitating and expediting the warehousing business. Certain commodities must necessarily be deposited in large commercial warehouses and transactions relating thereto must be handled by paper. That paper is the warehouse receipt, which takes the place of the property and which enables persons dealing in the commodity to transfer ownership of the property easily and with confidence. Patently, the purpose of the Uniform Warehouse Receipts Act is to standardize the practice in the several states and to insure the integrity of warehouse receipts in the hands of every legal holder. In view of the evident legislative intent reflected in this purpose, the courts could have excluded from the operation of the Act, bailees whose principal business is not warehousing, and cases where the bailment of property is not done as a part of the business of the bailor. This is a proper distinction between the "convenience" bailment and the "commercial" bailment. Coupled with the definition of storage set out above, this could have formed the basis for a more workable and more realistic means of setting up the law of valuation in uniform warehouse receipts cases. Thus the rule would be that the Uniform Warehouse Receipts Act does not apply to:

1. Checking where the personality is not removed thereby from its intended continuous use,

2. Space rental where the owner retains some control of the property to the exclusion of the "bailee",

3. Storage (which removes the personality from its intended continuous use) where the bailor does not store as part of his business,

4. Storage where the bailee's principal business is not warehosuing but the the storage is offered merely as a convenience connected with his principal business.

What the courts actually have done is to combine the law of receipts and the Act with the rate-value proportion theory, with results that are confusing and at times harsh and illogical.

The Act defines warehouse receipts as follows:

"A receipt need not be in a particular form, but must embody within its written or printed terms:

(A) The location of the warehouse where the goods are stored;

(B) The date of issue of the receipt;

(C) The consecutive number of the receipt;

(D) A statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order;

(E) The rate of storage charges;

(F) A description of the goods or of the packages containing them;

(G) The signature of the warehouseman, which may be made by his authorized agent;

(H) If the receipt is issued for goods of which the warehouseman is owner; either solely or jointly or in common with others, the fact of such ownership;

(I) A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman

or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient.

A warehouseman is liable to any person injured thereby, for all damage caused by the omission from a negotiable receipt of any of the terms required by this section."

If the "warehouseman" stores goods for a profit and if he issues a document containing the above information, it is a uniform warehouse receipt. It is a written contract and its terms are binding upon the bailor whether or not he reads it and assents to its terms. A common provision in the convenience type receipt is:

NOTICE

THE CUSTOMER ACCEPTS THE RECEIPT AS CORRECT AN ALL RESPECTS, UNLESS THE CUSTOMER NOTIFIES US IN WRITING WITHIN TEN (10) DAYS AFTER THE DATE OF ISSUE THEREOF, OF ANY ERROR OR IRREGULARITY THEREIN.

IT IS AGREED THAT THIS RECEIPT SUPERSEDES ANY TEMPORARY OR INTERIM RECEIPT GIVEN BY US TO THE CUSTOMER.

The property described on the face hereof, we agree to take on storage and to have effected for the benefit of the customer insurance on each article listed in the receipt which shall, in terms usual to such insurance cover against loss by fire and theft for the accepted value set opposite each item, which accepted value shall also be stated to be the limit of our liability for any loss of or damage to said article. It is further agreed that the provisions of this receipt shall inure to the benefit of our insurance company to the same extent that they inure to the benefit of ourselves. It is also agreed that the provisions of the receipt shall not extend in kind or amount the insurance provided by our insurance policy.

It is further agreed that in case of loss or damage we are to have the option of putting the property in as good condition as when received by us; or of replacing with materials of like kind or quality; or of paying the accepted value as stated on the fact of the receipt, whichever is least, but in any event not for more than the accepted value of the property. We are not responsible for deterioration, or discoloration from natural causes, or inherent vice.

The above is part of the bailment contract between the parties. The Act provides:

"A warehouseman may insert in a receipt, issued by him, any other terms and conditions, provided that such terms and conditions shall not:

1. Be contrary to the provisions of this chapter.
2. In any wise impare his obligation to exercise that degree of care in the safe-keeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own."

The vast majority of the courts have applied the Uniform Warehouse Receipts Act to convenience storage bailments. Where the bailment complies with the letter of the Act, and the receipt containing a risk-proportioned rate is handed over in return for the goods, the limit of liability set out therein is binding.[8] But the limitation of liability is binding only if all the above requirements are met.

A very technical distinction is made where the receipt is *not* handed over in return for the property but is subsequently mailed or delivered to the bailor. It is ineffectual as a contract, and such limitation of liability of stated value as it may contain is a nullity[9]. The reasoning set out in the opinions is that the instant the property was handed over to the warehouseman, an implied bailment contract came into being, and this is the contract between the parties[9]. It cannot be varied without express agreement of the parties.

Exactly why an implied contract cannot be superseded by a new one which is entered into by taking the same steps that are effective to create a contract in the first instance is not explained in the cases. Certainly an implied, unwritten, unspoken contract is of no greater dignity than the written warehouse receipt contract, and the new contract would spell out new consid-

[8] *Tansig v. Bode & Haslett* (1901) 134 Cal. 260, 66 P. 259, 54 L.R.A. 774, 86 Am. St. Rep. 250, 160 A.L.R. 1115.

[9] 160 A.L.R. 1117, Annotation—Warehouse Receipt Limiting Liability (IV) Warehouse receipt containing clause as modification of contract.

eration running both ways. But the courts generally have held that subsequent issuance of the warehouse receipt is merely an attempt to vary the terms of an already valid contract by notice, and it has not been permitted.[6]

Several courts have further modified the above to the extent that if the bailor understood that a warehouse receipt would later issue, he would be bound by its terms upon receiving it. It would not be a "new" contract but one in contemplation when the property was turned over to the bailee. The understanding that the receipt would subsequently issue may be implied from past dealings between the parties or from other circumstances which make it appear that the bailor expected it. In this event he is bound by its terms.

Other distinctions have been made by the courts based on facts peculiar to the particular case. These are collated in an annotation in A. L. R., volume 160, commencing at page 1112.

The above represents the major line of authority. It justifies the following general statements:

1. Any person who is engaged in the business of storing goods for profit is a "warehouseman" within the meaning of the Uniform Warehouse Receipts Act.
2. A uniform warehouse receipt is one which complies with the letter of the definition thereof in the Uniform Warehouse Receipts Act.
3. An agreed value where the storage charge is proportioned to the risk is a valid means of fixing the liability of a warehouseman.
4. The terms and conditions of a technical warehouse receipt if issued by a warehouseman and handed over in return for property, is the entire bailment contract between the parties respecting the property, and its terms cannot be varied by parole evidence.
5. A warehouse receipt containing a limitation of liability based on a stated value proportioned to the storage charge, which is handed over in return for the property, is binding upon the bailor even though he did not affirmatively agree to the value, nor read the receipt.
6. An implied contract of bailment arises when goods are turned over for storage, and a warehouse receipt subsequently issued is of no effect to vary the terms of the implied contract.
7. If a warehouse receipt is not issued contemporaneously with delivery of the property, but the parties intended that one should subsequently issue, the subsequently issued receipt is the contract between the parties.

The warehouseman should bear all the above in mind in the preparation of his receipt. He should require the signature of the bailor where practicable, and he should be sure that the receipt spells out everything (repair work, etc.) he intends to do with the stored goods[7], and if he intends to let it go out of the building whose address appears on the receipt for storage, repair or cleaning, he must so recite on the face of the receipt[8]. Likewise if he intends to place the property in the hands of others, he must have express authorization to do so in his contract[9]. He must not subject the property to any greater risk than is implied in the contract or in the nature of the bailment[9]. It is common practice to send fur coats to central points hundreds of miles away for special cleaning, and this fact must be spelled out in the contract or the limitation of liability does not apply while the coat is out of the original bailee's hands.

There is a line of excellent cases on receipts as contracts decided by the United States Supreme Court relating to bills of lading, which may be used to sustain the receipt-contract theory in storage cases[9]. Also of value are the baggage carrier tariff cases (following the *Hooker* case[9]) in sustaining the validity of limitation of liability provisions in warehouse receipts where the limitation is based on rate-value proportion.

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[7] *Ins. Co. v. Cikra, Inc.* (1951) 155 O. S. 421, 99 N. E. 2d 81.

[8] *Conkle v. G. K. Scott Co.* (1947) 147 O. S. 487, 72 N. E. 2d 82.

[9] *American Ry. Express Co. v. Lindenburg* (1923) 260 U. S. 584, 67 L. Ed. 414, 43 S. Ct. 206; *Missouri K. & T. Ry. Co. v. McCann* (1899) 174 U. S. 580, 43 L. Ed. 1093, 19 S. Ct. 755; *Jovite Cau v. Texas & Pacific Ry. Co.* (1904) 194 U. S. 427, 48 L. Ed. 1053, 24 S. Ct. 663; *Kansas City So. Ry. Co. v. J. M. Carl* (1913) 227 U. S. 639, 57 L. Ed. 683, 33 S. Ct. 391.

The Operation of the "Joint Tortfeasors Contribution Law" in New Jersey

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SINCE June 18, 1952, New Jersey has on the books a statute known as the "Joint Tortfeasors Contribution Law." It was inspired by the "Uniform Contribution Among Tortfeasors Act" as recommended for adoption by the Commissioners on Uniform Laws.[1] But other than inspiration, there is hardly any resemblance between the two acts. As a wag has said, "the comparison is odious", because of the havoc caused thereby. It is also unique.

This law provides for contribution among joint tortfeasors and because of its brevity, is set out in full as follows:

2A:53A-1. *Joint tortfeasors; single tortfeasor.*

"For the purpose of this act the term 'joint tortfeasors' means two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them. A master and servant or principal and agent shall be considered a single tortfeasor. L. 1952, c. 335, p. 1075. #1."

2A.53A-2. *Right of contribution.*

"The right of contribution exists among joint tortfeasors. L.1952, c. 335, p. 1075. #2."

2A:53A-3. *Judgment against a joint tortfeasor; contribution.*

"Where injury or damage is suffered by any person as a result of the wrongful act, neglect or default of joint tortfeasors, and the person so suffering injury or damage recovers a money judgment or judgments for such injury or damage against one or more of the joint tortfeasors, either in one action or in separate actions, and any one of the joint tortfeasors pays such judgment in whole or in part, he shall be entitled to recover contribution from the other joint tortfeasor or joint tortfeasors for the excess paid over his pro rata share; but no person shall be entitled to recover contribution under this act from any person entitled to be indemnified by him in respect to the liability for which the contribution is sought. L.1952. c. 335, p. 1075, #3."

2A:43A-4. *Application of act.*

"This act shall apply to all actions for contribution commenced, and to all judgments recovered, after the effective date hereof irrespective of the time of the commission of the wrongful act or acts by the joint tortfeasors; provided, that it shall not apply with respect to payments made prior to the effective date hereof. L.1952, c. 335, p. 1075, #4."

2A:53A-5. *Short title.*

"This act shall be known and may be cited as the "Joint Tortfeasors Contribution Law." L.1952, c. 335, p. 1076, #5."

It is known that the draftsmen of the New Jersey Act had the Uniform Law before them when they worked on the matter, since the first sentence of New Jersey Statute is identical with Section 1 of the Uniform Act, and New Jersey Statute 2A: 53A-2 is identical with Section 2 (1) of the Uniform Act.

From that point on, however, the two statutes sharply diverge from each other. A previous comparison by another writer is here adopted:[2]

"Section 2 (2) of the Uniform Law provides that the right to a money judgment for contribution does not arise until one tortfeasor by payment has discharged the common liability or has paid more than his pro rata share thereof. Section 2 (3) of the Uniform Act provides that a joint tortfeasor who settles with the injured party is not entitled to recover contribution from another joint tortfeasor whose liability is not extinguished by the settlement. The

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[1] 9 U.L.A. 163. (The Uniform Act has only been adopted by Arkansas, Delaware, Hawaii, Maryland, New Mexico, Pennsylvania, Rhode Island, and South Dakota).

[2] 7 Rutgers Law Review 380 (1953)

New Jersey Law, N.J. Stat. 2A:53A-3 is paralell to, but narrower than, Section 2 (2) of the Uniform Act, since the New Jersey Act conditions the right to contribution upon the payment in whole or in part of a judgment obtained by the injured party, and not merely upon the discharge of a common liability. However, the New Jersey Law completely omits Section 2 (3) of the Uniform Act and, in treating contribution as a right arising upon the payment of judgment to the injured person, apparently excludes entirely the notion that a tortfeasor settling with the injured party is entitled to contribution. Section 2 (4) of the Uniform Act, which is regarded by the commissioners themselves as optional, provides for apportionment of contribution in accordance with the relative fault of the tortfeasors. This Section is omitted in the New Jersey Law.

"Section 3 of the Uniform Act provides that the recovery of a judgment by the injured person against one joint tortfeasor does not discharge the others. *(This is not specifically provided for by the New Jersey Act, but our court has held that this is the effect of the law even though the Act is silent on the subject because the common law still exists*[2]*).*

"Section 4 of the Uniform Act provides that a settlement made by one tortfeasor does not release the others unless the release specifically so provides, but that such a settlement reduces the injured person's claim against the other tortfeasor. Section 5 of the Uniform Act provides that a release of one joint tortfeasor does not relieve him from his duty to contribute to the other joint tortfeasor unless such release is given before the right to secure a money judgment for contribution has accrued and provides for a reduction of the injured person's damages against the others to the extent of the releasee's pro rata share. Neither Section 4 nor Section 5 was adopted in New Jersey, *(but questions similar to these provisions have been considered and decided by our court under the Act, to be later discussed here).*

"Section 6 of the Uniform Act, providing against impairment of any right of indemnity under existing law, is substantially adopted in the last clause of N.J.Stat. 2A:53A-3 Section 7 of the Uniform Act is purely procedural and New Jersey did not adopt it. *(This was the chief reason for confusion as will be shown.)* New Jersey similarly did not adopt Section 8 of the Uniform Act, providing for severability in case of partial unconstitutionality, nor Section 9, providing for interpretation so as to make uniform the laws of all states adopting the Act, nor Section 11 providing for repeal of all acts or parts of acts inconsistent with the Contribution Law. Section 10 of the Uniform Act, providing a short title for citing the Act, is equivalent to New Jersey N.J. Stat. 2A:53A-5. Finally, the New Jersey Act, in N.J. Stat. 2A:53A-4, provides specifically for retroactive application while the Uniform Act contains no such provision."

Prior to the enactment of this statute, under the common law, contribution could not be enforced under any circumstances and it rested with a plaintiff to decide which of a number of tortfeasors would be sued, and a judgment having been obtained against multiple defendants, which of those defendants should be called upon to pay. Every accident involving more than one prospective defendant introduced a race and plan among persons liable, to obtain from the plaintiff, covenants not to sue, or other agreements for preferential treatment. The refusal of our courts to apportion loss among joint tortfeasors was consistent with the then public policy against enforcing claims between parties *in pari delicto.*[4] The common law was incompatible with the modern and equitable view of determining and apportioning liability according to fault[5] and for many years, the Legislature of New Jersey was importuned to enact the Uniform Act. This movement was inspired by railroads and large self-insurers, but not insurance carriers. Although the demand for passage annually appeared before the legislature, it was consistently defeated.[6] This rule was largely the result of *Merryweather v. Nixan,* 8 T.R. 186, K.B. (1799); it is no longer the law in England. In that case, plaintiff and the defendant had done an injury to a mill, apparently having taken or damaged the machinery. The plaintiff having satisfied the judgment of the mill owner, sued for contribution. He was non-suited by the trial judge "since no contribution

[2] *Judson v. Peoples Bank & Trust Co. of Westfield,* 17 N.J. 67 (1954)

[4] *Manowitz v. Kanov,* 107 N.J.L. 523 (E.&A. 1931)
Malinauskas v. Public Service Interstate Transp. Co., 6 N.J. 269 (1951)

[5] Prosser, *"Torts"*, page 1114.

[6] Assembly Bill #104 of 1949, Assembly Bill #267 of 1950.
Assembly Bill #242 of 1951.

could by law be claimed as between joint wrongdoers . . . on the mere ground that the plaintiff had alone paid the money which had been recovered against him and the other defendants . . ."

This ruling was based upon the theory that the law will not lend its aid to him who founds his cause of action upon an immoral or illegal act, nor will it undertake to adjust the burdens of misconduct; the machinery of the court will not ordinarily be put in motion to adjust equities by the persons who have been engaged in unlawful action or to relieve a culpable wrongdoer, even as against another wrongdoer equally liable from the consequences of his unlawful act, the policy of the law being to leave such parties in the position in which it finds them. Denial of contribution was said to be justified under this doctrine, as a means of protecting the pecuniary interest of the state and the right of other litigants to unimpeded justice in the courts, and as a method of deterring potential wrongdoers from combining to commit wrongs by imposing the risk upon each of responsibility for all the consequences.[7]

In 1952 the proposal for relief in such cases was again presented to the legislature, and after making its way through both houses, the present act emerged. It can hardly be recognized as has been shown by comparison with the Uniform Act.

Since its passage, although heralded as a "Major Reform In The Law,"[8] after more than two years of experience and interpretation, the label given hardly or appropriately describes its operation. It has not brought about any major reform in the law, nor has it contributed any beneficial effects in promoting the social welfare in its intended purpose of equalizing burdens among several persons who should bear them.

In its operation, the act has bewildered judges and litigants, it has spawned prolific litigation and controversies, and has created paradox and absurdity. Above all, it has been construed by our courts to apply to all torts, intentional or otherwise, which its sponsors never contemplated or anticipated. It has produced a plethora of legal literature,[9] and has even posed among its supporters, the question whether the fight to bring about its passage, was worth the effort.

Even the Uniform Act has been withdrawn by the Commissioners on Uniform State Laws because of slow progress in the legislatures, unsatisfactory experience in practice, and adverse criticism. A revised act is now in preparation.[10]

About one year after the act went into effect, one of the trial courts in New Jersey was called upon to decide whether in a case where a motorist was sued alone, he could implead by third party practice, another motorist who was jointly involved with the collision, in order that contribution could be enforced between them in the event of a judgment against both of them.[11]

That situation was novel in New Jersey as a matter of procedure, because until the passage of the act, third party practice could not be invoked by a defendant against a non-party in a negligence action, because of the denial of the right of contribution under the common law. Moreover, under the Rules of Practice and Procedure, effective since September 15, 1948, there was doubt whether third party practice in tort cases was within the scheme and purport of the new rules. In fact, it had been decided that there was no legal right to use it.[12]

In this particular case, in 1953, the Law Division held that since the Joint Tortfeasors Contribution Law provided for contribution, it permitted a joinder of the third party not sued, without waiting for the entry of judgment, under the Rules of Practice and Procedure which did not forbid it. This impact of the act on the Rules of Practice and Procedure, of a matter of substantive law, was the direct result of the case of *Winberry v. Salisbury*,[13] which held that the supreme court, had the exclusive power and authority in New Jersey, under the Constitution of 1947, to promulgate rules of practice. Besides, because of this authority it was considered to be the very reason for omitting from the act all procedural devices, and which left the act as a mere skeleton and destroyed

[7] 13 Am. Jur. #38 page 36

[8] 75 N.J. Law Journal 332 (9/18/52)

[9] *"New Jersey Joint Tortfeasors Contribution Law,"* 7 Rutgers Law Review 380 (1953); *"Survey of Law of New Jersey"* 1953, 1954, 9 Rutgers Law Review, 158 (1954)

[10] 68 Harvard Law Review 697 (Feb. 1955)

[11] *Douglas v. Sheridan*, 26 N.J. Super. 544 (Law Div. 1953)

[12] *Malkin v. Parsons*, 7 N.J. Super. 318 (City Ct. 1949)

[13] 5 N.J. 240 (1950)

its shape and symmetry."[14] This clash has been the cause of all doubt.

In the meantime, other cases were docketed on appeal to the Appellate Division, in which a variety of questions were presented calling for interpretation. Exercising its supervisory power, the Supreme Court of New Jersey certified on its own motion several cases then pending in the Appellate Division and brought all of them before it for review.[15] (A wholesome device often used by the court in matters of great public importance in order to expedite the cases and resolve uncertainty).

On June 11, 1954, the supreme court announced its decisions in three cases which adjudicated many of the controversial questions then raging among the bench, bar and public as to the meaning and extent of coverage of the new act. It is debatable whether the court *settled* as a definitive matter many of the questions presented, or whether it did not in fact, create further doubt on the entire act in many respects. It certainly pointed out many areas of darkness and, itself had to resort to the Uniform Act for guidance on matters expressly omitted from the statute. This process of resort to omitted matters in an adopted statute is itself a highly controversial approach.

It was announced that the right to claim contribution upon the recovery of a judgment by the victim against one or more of the joint tortfeasors, has been created by the act and given recognition. Any joint tortfeasor who pays more than his *pro rata* share of the judgment may now maintain an action for recovery of the excess from other joint trotfeasors equally liable. As a result, the purchase of covenants not to sue, or releases under circumstances which do not serve to extinguish the claim against all joint tortfeasors will no longer confer immunity against payment of a full, just share of the damages recovered for wrongful acts, neglect, or default.

In the three contribution cases, *Sattelberger v. Telep*[16] held that the defendant need not wait for judgment against him to sue for contribution but might join a third party in the original suit; *Pennsylvania Greyhound Lines, Inc. v. Rosenthal*[17] gave meaning to the confusing language of Section 4; and *Kennedy v. Camp*[18] settled the harassing question of the liability of a joint tortfeasor spouse. In these decisions the court also took the opportunity, by way of dictum or otherwise, to clear up certain other ambiguities in the statute.

The *Sattelberger* case was an action for contribution after a judgment had been paid. The defendant in the contribution action had not been joined in the original suit. He objected on the ground that no procedure existed in the Contribution Act for suing him since those provisions which appeared as optional in the Uniform Act had been omitted by the legislature. The court pointed out that under *Winberry v. Salisbury* the legislature properly refrained from adopting rules for what was obviously a matter of third party practice. In the course of the opinion, Justice Heher considered and rejected the contention that the Contribution Act was unconstitutional as a deprivation of due process of law because of the omission of procedural devices.

In the second case on contribution, *Pennsylvania Greyhound Lines, Inc. v. Rosenthal,* arose the problem of whether the act was retrospective. Section 4 of the proposed statute had originally provided that, "This act shall apply to all actions for contribution commenced, and to all judgments recovered, after the effective date hereof, irrespective of the time of the commission of the wrongful act or acts by the joint tortfeasors." Standing alone, this language appears to mean that recovery could be had only in actions based upon judgments recovered after the effective date of the act. The date of the judgment would then determine whether the statute applied or not. But in his conditional veto message, the governor raised an issue concerning the time when payments on a judgment are or were made. Fearing that no provision had been made for this important part of the statutory scheme, even though it was obvious that Section 3 of the act had predicated recovery upon payments under a judgment, and Section 4 limited the application of the act to judgments recovered after its effective date, the governor conditioned his approval of the act upon the amendment of Section 4 to include the words "provided, that it shall not apply with respect to payments made prior to the effective date hereof." Read together with the first part of Section 4, this pro-

[14] *Sattelberger v. Telep,* 14 N.J. 353 at 369 (1954)
[15] Rule 1:10 (Appeals on Certification)
[16] 14 N.J.353 (1954)
[17] 14 N.J.372 (1954)
[18] 14 N.J.390 (1954)

viso appears meaningless since, if the act does not apply to judgments recovered prior to its effective date, it is impossible to suppose that it can apply to payments under a judgment which were made prior to the effective date of the act.

The supreme court concluded that the act applied to judgments whenever recorded so long as payment under them had not been made prior to the effective date of the act. Thus, in the *Rosenthal* case, judgment in the original suit was entered on March 26, 1952; the Joint Tortfeasors Act was enacted June 18, 1952; and payment of the judgment was made on December 19, 1952. In order to make sense of the above-mentioned proviso, the court held that this fact situation came under the provisions of the act. It is difficult to see what other conclusion the court could have reached in the circumstances, although it is somewhat ironic to read that "such is the obvious sense and significance of the statute, for otherwise the proviso would be superfluous." It is submitted that the proviso was not merely superfluous; it rendered the provision hopelessly ambiguous.

In giving retrospective effect to the act, the court called the statute "remedial and procedural." Remedial it undoubtedly is, but to call it *procedural* in the light of *Winberry v. Salisbury* is to cloud a distinction the importance of which is vital to the jurisprudence of this state.

In the *Rosenthal* case, the defendant interposed another objection to liability. After the judgment in the original suit had been paid by the first defendant, but before the contribution action was commenced against the second defendant, the second defendant married the plaintiff in the original suit. He therefore claimed that his subsequent marriage barred the contribution suit. The argument was based on the theory that the right of contribution under the statute was a derivative one, stemming from original liability for the tort. The marriage of the parties destroyed the claim which the plaintiff could have made against the defendant for the premarital tort. The court quickly disposed of the argument by observing that payment to the plaintiff by the first defendant extinguished the liability of the second defendant to her and gave rise to a cause of action in the judgment-paying defendant for contribution by the other defendant. The decision left open the question of liability of a spouse to contribution under circumstances in which a spouse joins with a third party in committing a tort against the other spouse.

This precise fact situation arose in the third contribution case, *Kennedy v. Camp*. Here a husband and a third party joined in injuring the wife. Section 1 of the act provides that "For the purpose of this act, the term 'joint tortfeasors' means two or more persons jointly and severally liable in tort for the same injury . . . " In the contribution action, the husband claimed immunity since it was evident that he was not a "joint trotfeasor" because he could not be liable in tort for injury to his wife. The court agreed with him. The opinion contains a lengthy and sympathetic examination of the common law rule of immunity of spouses from tort liability. A Rutgers Law School professor reviewing this case said:[19]

"Regardless of the merits of interspousal immunity, particularly in this day and age when tort liability is coming to be based on equitable shifting of loss rather than punishment for antisocial behavior, its effect on the third party is obviously unfair. It permits a spouse to use the marital relation to escape equitable payment of an obligation owing to a stranger. This is the blunt truth.

"It is also true that the wording of the Act encourages this result. Mr. Justice Jacobs in a concurrring opinion refused to accept the language of the opinion of the court as it refers to the outworn doctrine of immunity. Nevertheless he concurred in the result since it appeared to him inescapable in the light of the statutory definition of 'joint tortfeasor.'

"Since the common law courts are so reluctant to unmake the interspousal immunity rule which they themselves made, it is apparent that the legislature must be looked to for a remedy more in harmony with existing conditions. It seems obvious that in the Kennedy case the court missed a golden opportunity to resist an extension of the immunity rule to cover equitable contribution. The rule is bad enough without invoking it against strangers. Here the court could have so interpreted the Act as to impute to the legislature an intent not to go further than the ancient common law had gone in granting immunity to

[19] 9 Rutgers Law Review 158 at 162 (1954)

spouses as to each other. To interpret the language to mean an intention to deprive strangers to the marital relations of their just compensation seems quite unfair."

A similar interpretation of this section was made by the Appellate Division which held that a third party defendant may not join an employer who is liable for workmen's compensation in a suit by the injured employee on the ground that the employer was concurrently negligent and thus is liable for contribution under the act.[20] The reason given by the court was that the act restricts its application to those who are "jointly liable in tort." An employer liable for compensation payments is not "liable in tort" to an injured employee and hence the employer is not liable for such contribution.

A further vexing problem relates to the case where a suit is brought for contribution against a defendant not joined in the victim's action or brought in by impleader.

While contribution cannot be sought except by a joint tortfeasor who has actually paid a disproportionate share of a judgment, every defendant named in the initial action brought by the victim has an interest in adding as parties all other joint tortfeasors against whom contribution might ultimately be claimed conferring at the instant of damage, an inchoate right to enforce it at a later period.[21]

This inchoate right of contribution which springs into existence at the time of the accident prior to the consummate right to enforce contribution after an unequal share of the burden has been paid by one joint tortfeasor, in itself has already created serious confusion and complexity because of procedural limitations, and unfamiliarity with the nature of the right providing for contribution.

This question recently came up for consideration in *Bray v. Gross*,[22] where one of several joint tortfeasors became enmeshed in the complexity of procedure, and as a result of the dilemma, lost his right to contribution and was found ultimately to be the sole tortfeasor liable for the entire judgment, while others jointly responsible went scot-free.

In that case it appeared that two actions were instituted arising out of a single highway accident in which a tractor-truck and two automobiles were involved. The cases were consolidated for trial.

In the first, Victor Lynn Lines Inc., owner of the tractor, sued John T. Bray, owner and operator of one of the automobiles and James A. Gross, driver of the other car, joining also as a defendant, Mrs. Gross, owner of the car he drove and an occupant at the time of the collision. In the second, Bray sued Victor Lynn Lines, its driver, Hayward T. Sockriter, and Gross. Gross sought no relief by way of counter-claim or cross-claim against either plaintiff or defendant. At the close of the plaintiff's case in the first suit, defendant Bray moved to dismiss Victor Lynn Lines' complaint as to him and the plaintiff assented.

The converse occurred on the completion of the case in the second action. Victor Lynn Lines moved for a dismissal of Bray's suit against it, and its driver over the mild protect of plaintiff. The attorney for defendant Gross, who even doubted his right to address the court because he represented neither of the parties involved in the motion, suggested that testimony still to be presented might show negligence on the part of the truck driver, but the court nevertheless granted the motion. No mention was made at that time of a possible right of contribution between the co-defendants in the suit brought against them by Bray.

The case then proceeded with Gross, the sole defendant in the Bray action and Gross and his wife, the only defendants in the Victor Lynn Lines action. When the testimony had been completed and before the cases were submitted to the jury, the attorney for Gross moved to vacate the order of dismissal of the complaint by Bray against Victor Lynn Lines Inc. and its driver pointing out for the first time the possible right of contribution Gross might have against his co-defendant under the Joint Tortfeasors Contribution Law. The motion was denied although the court commented that if the contribution aspect of the case had been brought to its attention in the first instance, it might have granted the dismissal without prejudice.

The jury returned verdicts in favor of Bray and Victor Lynn Lines and solely against the defendant Gross. An appeal was then taken by Gross and he contended there was error because the dismissal of Bray's action against the trucking company occurred before he, Gross, had the oppor-

[20] *Farren v. N. J. Turnpike Authority*, 31 N.J. Super 356 (App. Div. 1954)
[21] *Sattelberger v. Telep.* supra.
[22] 16 N.J. 382 (1954)

tunity to prove as he called "tortfeasorship" of his co-defendant in order to establish his claim to contribution.

On appeal, the supreme court realized that Gross, under all the circumstances had been caught in the maze of procedure, but found that the court was not in error in proceeding with the trial under all the circumstances.

The court stated that the difficulty encountered was new and novel and no procedure had been established constituting a precedent, and the exigencies of the situation may require a modification of the present rule dealing with third party practice in accordance with the light shed by the Joint Tortfeasors Contribution Act. It did give some comfort to the defendant Gross as a martyr, by offering guidance for the future, as follows:

> "Perhaps the best solution of the dilemma, in like cases hereafter, in tort actions where there is more than one defendant, would be to withhold rulings on motions for dismissal, unless the circumstances are unusual, until the conclusion of the entire case if any co-defendant shall so request. Such an application, based on the Joint Tortfeasors Contribution Act, would then be deemed to have the effect of an impleader holding the parties in status quo until all the evidence on their liability and the right of contribution has been adduced. The statutory purpose of resolving, as far as practicable, all the issues in a single action will thus be best served."

The court in the *Bray* case recognized the need for further revision of the Rules of Practice and Procedure and additional experience under the statute. However, this "moving in the dark" can be attributed, in the main, to the lack of integration of the substantive right of contribution and the necessary procedural machinery to enforce it, brought about by the paramount power of the supreme court as settled in *Winberry v. Salisbury* to enact rules of practice and procedure.

It is apparent that because of separation of substantive law and procedural rules to enforce the legal right, confusion and complexity are bound to exist, and have already taken their toll.

The conflict between procedural devices and the substantive right of enforcing contribution is likely to create even other odd results. On the other hand, the clash between the policy of settling the issue of liability in one action against all tortfeasors responsible in order to eliminate unnecessary litigation, and the substantive question of distribution of the burden equally among those liable, can and should be worked out. Unless all tortfeasors are present in the same action, the effect of liability decided against one tortfeasor will have to be relitigated in the contribution action as against those joint tortfeasors not parties in the first proceeding. This result is a necessary evil because of circumstances where all persons liable are not available for service of process in all cases.

To provide for this result, third party practice under our rules has been held by our court to be available in all cases, and it has encouraged that it be used wherever possible.

The act was next considered on the extent of coverage, and the proportion of payment, in the case of a settlement of a fraud case by less than all tortfeasors.[23]

In that case, an action was brought for damages on a claim that five defendants had fraudulently conspired to oust plaintiffs from control of a corporation by inducing them to part with their stock at an unconscionable price. Pending the action, plaintiffs settled with two defendants for the sum of $2500, a claim for $315,000, and a consent judgment of dismissal was entered as to them but with a reservation to proceed against the three remaining defendants. Summary judgment was sought and granted by the remaining three defendants on the theory that the settlement constituted a satisfaction of the claim.

The court proceeded to discuss the nature of contribution and again was plagued by the paucity of language and other authorities to aid in reaching a conclusion as to the meaning of the statute.

As to coverage, the defendants argued that contribution was not enforceable because the statute was not intended to cover the case of malicious, fraudulent and intentional wrongs, but was intended to apply only to negligent conduct.

The court concluded that under the phrase "wrongful act, neglect or default" the statute meant to embrace all torts, which includes fraud, acts of trespass to the person, as well as criminal acts of violence, and referred to the Uniform Act

[23] Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954)

for guidance, but even worse, the "Commissioners Notes" under this section of the Model Act.

It is interesting to again observe that the supreme court as on prior occasions in its struggle to receive aid and illumination as to the meaning of the statute refers to the Uniform Act, which was not adopted in New Jersey except as to definition of terms.

There was a vigorous dissent in this case by Mr. Justice Heher against the interpretation given as to coverage. He wrote that the essentially equitable doctrine of contribution did not extend to all torts, "no matter how flagrant or steeped in villany and moral depravity they may be." His reasoning was that the language relied on by the majority based on the phrase, "wrongful act, neglect or default," was to be construed by giving them the same meaning as their associates, as well as a consideration of the basic purpose of the act as intended by the legislature to cover only negligent, unintentional conduct.

Any doubt as to the effect of releases, court settlements, or covenants not to sue, with less than all persons liable for the injury was dispelled by the supreme court in this same case, where the effect of a settlement made by several tortfeasors regarding their liability to bear their *pro rata* share which other remaining tortfeasors were required to bear was clearly delineated, and so construed as to discourage them, if not to make settlement a difficult and dangerous matter.

It is interesting to note that when the Uniform Act was first proposed by the commissioners in 1939, the Association of Casualty and Surety Executives, in a memorandum prepared in opposition to the proposed Uniform Law was strenuously against its adoption. The principal ground of opposition was that the statute would afford an empty remedy, and would restrain, hinder and delay settlement of cases, because contribution claims would exist chiefly against impecunious wrong-doers whom plaintiff would not bother to sue, so that insurance companies could expect to recover by way of contribution, very little from them.[24] This prophecy has been very much fulfilled in New Jersey.

The court in the Judson case then proceeded in an entirely gratuitous manner to consider the bearing of settlement upon the contribution rights of the remaining defendants if they suffer a verdict for damages. The court stated that equality between the joint tortfeasors may be realized in one of two ways: (1) by crediting on the verdict not the amount received in settlement, but the settler's pro rata share of the verdict, or (2) by giving judgment for the full damage less the amount received in settlement and leaving to the judgment tortfeasor who pays more than his pro rata share his action against the settler for contribution. The second alternative is the one adopted in Sections 4 and 5 of the Uniform Act. But, our legislature rejected Sections 4 and 5 of the Uniform Act thereby indicating its preferance for the first alternative. The court stated that while our statute contains no express provision on the subject, the first alternative is a logical incident of the right created. Pro rata shares are to be determined on the basis of the number of tortfeasors who are within the reach of process and are solvent, the equity rule on contribution.

It is evident from this holding that settlements between the victim and with less than all persons liable, will be practically non-existent. It clearly justifies the fear of opponents of the act who saw little social benefit in its adoption, as well as the anticipated increase of litigation which could otherwise be prevented or terminated. It will be virtually impossible to mark a file "closed" in any case involving multiple defendants where one tough or obstinate tortfeasor refuses to go along with an effort to settle a case with an injured plaintiff.[25] Moreover, it will be a calculated risk or an invitation to further litigation for any defendant to purchase a covenant not to sue because of the existence of the right of contribution which may later be asserted by others jointly liable for the tort. This result which prolongs litigation, and makes settlement risky, far outweighs and cancels out any countervailing benefits which the statute has claimed would be accomplished by its proponents. No wonder the Commissioners on Uniform Laws have withdrawn the Uniform Act from further adoption, and have instead announced a continued study to revise it.

While our statute is a major step forward, many problems and vacant spaces are

[24] *"Contribution Among Joint Tortfeasors; A Pragmatic Criticism"*, 54 Harvard Law Review 1156 (1941)

[25] Prosser, *"Selected Topics on the Law of Torts"* (1953)

presented thereby which will require judicial and perhaps further legislative action. Why New Jersey did not adopt the Uniform Act and thus support the Uniform Law movement, and to also receive the benefits of experience and interpretation by other adopting states, is at times a mystery. Perhaps the real reason is the influence which *Winberry v. Salisbury* had upon the legislature impressed with the superior power of the supreme court to enact Rules of Practice, and which results in the legislature providing the barest blue print of a law, and the supreme court constructing the actual edifice of the law by implementing it with the procedural devices necessary for enforcement.

The cases reviewed here are only those which have been decided by our courts. No effort has been made to consider others in the abstract. It is obvious that in view of the wide disparity between the New Jersey Law, the Uniform Act, and other statutes of states which have an independent act, that it would be of no service or benefit, nor could there for that matter, be anticipated with any degree of reasonable prediction the ultimate holdings of our courts. For the present it will suffice to merely state that there are many questions which will cause perplexity and uncertainty as they rise. As our supreme court has itself very well stated on this attitude of prevision:[26]

"It is not intended to attempt to pierce the vagaries and uncertainties of the future and in anticipation to dedicate ourselves to a particular path. Each case, until the difficulties are cleared, will have to be adjudicated as the equation arises, to determine compliance with the new act and whether the court used sound judicial discretion in the facts encountered. Our only obligation here is to decide the question presented, which we have done. Our sojourn in the horizons of tomorrow is merely suggestive, in an endeavor to avoid inequities as well as surplus and circuitous litigation, which the law abhors."

In the main, the statute is very poorly drawn. It is not a reticulated statute, but is a mere skeleton by comparison with the Uniform Act from which it drew its inspiration. Although many of the sections of the Uniform Act were not included in our statute, by necessity our courts have had to resort to the Uniform Act for illumination in dark areas in order to ascertain what the legislature intended. On the over-all, the statute is unworkable and vague, and besides interpretation and clarification, presents the occasion where the judiciary is called upon to fill in interstices and thus to serve as legislators brought on by *Winberry v. Salisbury*. In another aspect, the law falls within the class of statutes which create a right but do not provide for enforcement, and is open to criticism because of the failure to make known within the terms the evils sought to be corrected. The late Mr. Justice Cardozo stated,[27] that at best, statutory law until construed, is only "ostensible law," the "real law," is that found in the judgments of cases actually decided. Hence, this statute invites litigation instead of preserving the promoting peace and tranquility in the state.

Only time will tell how the law will continue to operate, because in practice it has caused more consternation than reform. Experience is a better teacher than theory, but theory is indispensible too. The perpetually changing problems of modern life brought on by injuries to people and the importance of assesing fault and compensation call for a flexible attitude which looks analytically at the past, realistically at the present, and hopefully toward the future with the knowledge that there must be constant adaptation to the new necessities of an expanding economy and dynamic society.

But it can reasonably be stated, that if the experience with the statute during the last several years as to this right of contribution is any criterion, there is very little hope for any noteworthy or radical change in social benefits, in order to fulfill the claims of its sponsors to bring about the reform which it was believed would result from its adoption.[28]

[26] *Bray v. Gross*, 16 N.J. 382 at 388 (1954). For example, whether and how the statute of limitations applies; questions of conflict of laws on judgments recovered in New Jersey and sought to be enforced in other states, or judgments recovered elsewhere where no contribution exists and sought to be enforced here; questions where bankruptcy or death of judgment debtor have intervened.

[27] *"Nature of the Judicial Process,"* page 126.

[28] *"Contribution Among Joint Tortfeasors: A Defense,"* 41 Harvard Law Review 1170 (1941)

Life Insurance Company Entitled to Premiums and Interest on Premiums as Credit Against Insured's Judgment

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AN interesting phase of life insurance litigation occurs in relation to situations where the insurer, believing that it has good grounds (non-payment of premiums by insured), causes a forfeiture of the policy and tenders to the insured the cash value thereof. Naturally, the insured refuses the tender and claims that his policy is in force. For instance, if it is a twenty-year endowment obligation, he may await the maturity thereof and upon maturity a suit is commenced against the company to compel payment of the face amount of the policy, together with attorneys' fees and costs.

Or take the situation where the insured holds a certificate of life insurance in a fraternal insurance order and is expelled from the order because of his violation of the constitution, rules or regulations of the order. The certificate holder refuses to accept the tender of the cash value, claims he was wrongfully expelled and awaits the time of the maturity of the obligation and then commences an action against the order to compel payment of the full face amount of the certificate.

Under either of the above situations, is the insurance company or fraternal order entitled to have offset or credited against the judgment obtained by the certificate holder or insured, all unpaid and past due premiums together with interest on the premiums to the maturity of the obligation?

The majority rule answers the question in the affirmative.

The precise issue encountered may be, just for example, stated as follows:

> A. An insured may be, or is, relieved of the necessity of tendering to the insurance company, subsequent premiums if the insurer refuses to accept them. But the insured is not relieved from the obligation to pay the premiums should the basis of the insurance company's refusal to accept the premiums be adjudged erroneous, the policy found to be in force and the insured has judgment against the insurance company for the face amount of the policy;
>
> or:
>
> B. Where the insurer, a fraternal insurance order refuses to accept subsequent premiums after the expulsion of the insured member from the order, it is not necessary for the insured to continue to tender the premiums weekly, monthly, etc., as they become due, but if the insured recovers judgment for the full face amount of his policy or certificate, the insurer is entitled to have deducted from the judgment plaintiff obtains, all past due premiums and interest thereon. Thus, recovery by the plaintiff is not from a fund to which the insured did not contribute.

As to "A" above, the following cases are cited wherein it is clearly demonstrated that preimums and interest thereon must be deducted from the judgment.

In the case of *Kroener v. Mutual Life Insurance Company of New York*, 297 Fed. 612, 35 A.L.R. 1248, the Seventh Circuit court, in affirming the action of the trial court in deducting the premiums and interest thereon said:

> "Apart from any question of tender, it seems clear that, if premiums remain unpaid and the policy in force, the company would be entitled on maturity of the policy to retain the matured premiums, with lawful interest thereon from their maturity. *MacMahon v. United States Life Ins. Co.*, 128 Fed. 388, 63 C.C.A. 130, 68 L.R.A. 87; *Shaw v. Republic Life Ins. Co.*, 69 N. Y. 286; *Reed v. Provident Life Ins. Co.*, 190 N. Y. 111, 82 N. E. 734; *Inter-Southern Life Ins. Co. v. Duff*, 184 Ky. 227, 211 S. W. 738; *New York Life Ins. Co. v. Lahr* (Ind. Sup. 1922) 134 N. E. 657."

In *New York Life Ins. Co. vs. Norris*, 91 So. 595 (Alabama), the Supreme Court of Alabama held:

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"A seasonable effective tender of premium on a life insurance policy, which was refused by the insurer, need not be kept good by the retention of the money so tendered, but the rights of the insurer in that respect will be conserved by the appropriate reduction of the amount recoverable under the policy, by the aggregate of the unpaid premiums with interest thereon from the respective dates they should have been paid."

The court said in its opinion:

"To serve the preservative purposes within the principles stated, a seasonable, effective tender is not required to be kept good by the retention of the money so tendered, every essential right of the insurer, in this aspect, being conserved by the appropriate reduction of the amount recoverable by the aggregate of the amount of the unpaid premiums, with interest thereon from the respective dates the contract stipulated they should be paid. *Dennison v. Fraternal Asso.,* 59 App. Div. 294, 69 N. Y. Supp. 291; *Owens v. Ins. Co.,* 173 N. C. 373, 92 S. E. 168; *Inter-Southern Co. v. Duff,* 184 Ky. 227, 211 S. W. 738."

In *Pennebaker, et al., v. North American Life Ins. Co. of Chicago,* 284 N. W. 147 (Iowa):

This action was brought by the assignees of the beneficiary under a life policy. The defendant contended the policy had lapsed due to non-payment of premiums.

Upon the rendition of judgment for the plaintiff, assignees, the court deducted therefrom the entire amount of past due premiums and interest on these premiums.

The insurer appealed from the judgment.

The Supreme Court of Iowa held in affirming the judgment:

"Where judgment was recovered against insurer on life policy, trial court properly deducted amount of unpaid premiums with accrued interest from sum called for in policy."

The court stated that the trial court properly deducted from the plaintiff's judgment, the unpaid premiums and interest thereon.

In *Newman v. John Hancock Mutual Life Ins. Co.,* 7 S. W. 2d 1015 (Missouri), the Missouri court held:

"Though insurer's refusal, on erroneous assumption of default, to accept tender of premium, relieved insured of duty to make tender of payment of other premiums to preserve rights under policy, such premiums and a loan obtained from insurer on the policy are to be deducted from the amount recoverable on the policy at death of insured."

The court, summing up the issue stated:

"The company had refused to accept the premium tendered in October, 1915, unless evidence of his then insurability were furnished. This evidence was not furnished, and the policy was then converted into a paid-up policy by the company. A tender of other premiums would have been useless, and the insured was not required to make them, and his rights or the rights of the beneficiary were not affected by his failure to make further tenders of premium, as we held on the former appeal in this case. See 216 Mo. App. 180, 193, 257 S. W. 190. This does not mean, however, that from that time forward he was to have free insurance. He was merely relieved from tendering a payment of premium in order to keep his policy alive, but at the same time the premiums would accumulate while he lived or until the company should change its position and offer to accept the premiums. The policy having been wrongfully converted and tender of premiums refused, the policy would remain in force and premiums would accumulate at the same time. When the obligation matured by the death of the insured, an accounting should be had, and the accumulated unpaid premiums with interest thereon, less accumulated earnings that were applicable to the payment of premiums, should be deducted from the amount to be recovered on the policy. *Wayland v. Indemnity Co.,* 166 Mo. App. 221, 238, 148 S. W. 626; *Reed v. Insurance Co.,* 190 N. Y. 111, 82 N. E. 736; *Kroener et al., v. Mutual Life Ins. Co.* of N. Y. (C.C.A.) 297 F. 612, 35 A.L.R. 1248; *Meyer v. Knickerbocker Life Ins. Co.,* 73 N. Y. 516, 29 Am. Rep. 200."

In *MacMahon v. United States Life Ins. Co.,* 128 Fed. 388 at 393, the Fifth Circuit court said:

"Of course, the unpaid premiums are to be deducted, with interest, from the

time at which they should have been received but for the action of the defendant."

In *New York Life Co. v. Lahr,* 192 Ind. 614, 134 N. E. 657 at 663, the court said:

"The trial court, recognizing the respective rights of the litigants, as above set out, fully protected appellant by deducting the amount of the delinquent premiums, with interest from their respective due dates, from the amount due."

The rule is again stated in 46 C.J.S., p. 701, par. 1394:

"In fixing the amount of recovery under a life insurance policy, as a general rule, any indebtedness due the company from the insured or the person entitled to the proceeds of the policy may be deducted from the amount otherwise payable. Thus it is proper to deduct the amount of due and unpaid premiums or assessments, together with interest thereon."

Couch Cyc. of Insurance Law, Volume 3, page 2055, Note 28, states:

"So where tender is excused, or not required, it is sufficient for the judgment, in an action on the policy, to provide for the payment of the premiums due and unpaid, with interest from the time when they respectively fell due."

Fraternal Insurance Cases

As to "B" above, the following citations are authority for the deduction of premiums and interest on premiums from plaintiff's judgment.

In *Biggs v. Modern Woodmen,* 71 S. W. 783 (Missouri):

In this case the jury's verdict was for $1,912.55 on a $2,000 certificate, they having deducted from the verdict, the sum of $87.45 which was the amount of eleven unpaid premiums. No mention is made of interest on these premiums.

The defendant, Modern Woodmen, nevertheless appealed.

In affirming the judgment, the Missouri court said:

"The affirmance of this case will not result in permitting the insured's beneficiary to recover and be paid out of a fund to which he did not contribute, since that is taken care of by having the jury deduct the premiums which would have been, but were not allowed to be, paid on account of defendant's arbitrary and wrongful conduct."

In *Marty v. Security Benefit Ass'n.,* 99 S. W. 2d 132 (Missouri), the Missouri court held:

"Deceased member of beneficiary association whose application for reinstatement had been wrongfully rejected did not have to tender further assessments thereafter, but assessments should have continued to accumulate as a charge against certificate, so that upon his death beneficiary would have received amount of certificate minus amount of unpaid assessment and interest."

In *Reiter et al., v. National Council of Knights and Ladies of Security,* 154 N. W. 665 (Minnesota):

The certificate holder was notified that no more dues or assessments would be accepted from her unless and until she had recovered her health and was examined by a physician.

The court found from the evidence that this action was unauthorized, and in effect the order had suspended the certificate holder, which also was unauthorized. The Supreme Court of Minnesota citing *Ibs v. Hartford Life Insurance Co.,* 141 N. W. 289, *Kulberg v. National Council,* 145 N. W. 120, and *Marcus v. National Council,* 149 N. W. 197, stated:

"It should be noted, however, that the amount of any recovery by plaintiffs is subject to a deduction for all assessments and dues not actually paid."

In *Marcus v. National Council of Knights and Ladies of Security,* 149 N. W. 197, (Minnesota), it was held:

"After such notice, no further tender of assessments by deceased was necessary to keep her certificate in force. Her obligation to the defendant was not thereby discharged. The conduct of the defendant simply waived payment of assessments at the times stipulated in the con-

tract. Under the circumstances, if the member stands on the contract and seeks to enforce it he must discharge his obligation of payment as a condition to such enforcement, and should the society change its attitude and again recognize the contract, the member must continue to discharge the obligation of the contract if he would continue it in force."

The opinion of the Supreme Court of Minnesota stated:

"Tender never discharges an obligation. It simply excuses the person owing it from the consequences of failure to make payment at the time the contract requires. The declaration of a beneficiary society that it will not receive further payments from a member simply excuses the member from payment at the time and in the manner required by his contract, but if he stands on his contract and seeks to enforce it, he must discharge his obligation of payment as a condition to such enforcement."

A Problem Under the Omnibus Clause—the "Case" Case

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THAT wasn't really the name of the case, but the insured was named Case, the original file had been made up in his name, and it just seemed natural to refer to the resulting suit on the policy as the "Case" case, even though Case was not joined as a party.

Case had been issued a standard automobile liability insurance policy, and the automobile which was described in the policy was one which Case then owned, a 1937 Chevrolet. Some time after the policy was issued, Case sold the Chevrolet to a man named Wylie. Wylie paid only a portion of the agreed purchase price, and executed a note for the balance. The note contained certain provisions whereunder Case retained title to the automobile until the note was paid. A few days thereafter, and before any portion of the note was due, Wylie was driving the automobile and injured a pedestrian, a boy named Clarence Bowers. The accident was reported to the insurance company, an investigation was made, and it was during the course of the investigation that the insurance company first learned of the condition sale of the automobile. Case had not reported the sale, he had not purchased another automobile, and he had not cancelled the policy.

Suits were instituted in the Circuit Court for Jefferson County, Tennessee, on behalf of the injured boy and his mother, Delia Bowers. Named as defendants in each suit were Case and Wylie. The plaintiffs' attorneys found that Case could have no legal liability and hence voluntarily dismissed both suits as to him. We refused to defend Wylie under the policy and, as was anticipated a default judgment was entered in each of the suits as against Wylie. Execution was issued on each of the judgments and returned unsatisfied.

Then came the suit on the policy—the one we refer to as the "Case" case. It bore the caption, *Delia Bowers* v. *The Home Indemnity Company*, and was also filed in the Circuit Court for Jefferson County, Tennessee. The theory of the suit was that the insurer was obliged to pay the judgment which the plaintiff had obtained against Wylie, because Wylie was an additional insured under the omnibus clause of Case's policy, which clause read thusly:

"III Definition of Insured: With respect to the insurance for bodily injury liability and for property damage liability, the unqualified word 'insured' includes the named insured *and also includes any person while using the automobile* and any person or organization legally responsible for the use thereof, *provided the actual use of the automobile is by the named insured or with his permission*. The insurance with respect to any person or organization other than the named insured does not apply:

(a) to any person or organization, or to any agent or employee thereof, operating an automobile repair

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shop, public garage, sales agency, service station or public parking place, with respect to any accident arising out of the operation thereof;

(b) to any employee with respect to injury to or sickness, disease or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer." (Emphasis supplied.)

The plaintiff's contention was that when Case sold his automobile, he necessarily gave Wylie permission to drive it, and Wylie was driving the automobile with this permission at the time of the accident so as to be covered by the omnibus clause. When coupled with the usual charge that the policy language above quoted was ambiguous and hence should be construed most strictly against the insurer, the proposition was sustained by the trial court and was almost sustained by the Tennessee Supreme Court. But we are getting ahead of our story.

Our theories in the suit were, first, that the conditional sale of the automobile vitiated the policy, and, secondly, that in any event the conditional vendee was not an additional insured under the omnibus clause.

Our first theory found support in certain of the policy language. Thus, Insuring Agreement VIII read as follows:

"VIII Policy Period, Territory, Purpose of Use: This policy applies only to accidents which occur and to direct and accidental losses to the automobile which are sustained during the policy period, while the automobile is within the United States of America, its territories or possessions, Canada or Newfoundland, or is being transported between parts thereof, *and is owned, maintained and used for the purposes stated as applicable thereto in the declarations.*" (Emphasis supplied.)

Case's ownership of the automobile had been stated among the policy declarations thusly:

"Item 6. (a) Except with respect to bailment lease, conditional sale, mortgage or other encumbrance the named insured is the sole owner of the automobile. (b) During the past year no insurer has cancelled any automobile insurance issued to the named insured. Exception, if any, to (a) or (b): *none.*"

Incidentally, we found the courts to be rather intrigued with the phrase, "Except with respect to ——".

It would be natural to assume that there would be much judicial precedent for the proposition that a policy such as that issued to Case would be vitiated at such time as he might dispose of the automobile described in the policy, under a conditional sale or otherwise, and not replace it with another. Not so. We found no decision involving a conditional sale, and we found very few which were material at all to the question. One of the few was *Byrd* v. *American Guarantee and Liability Ins. Co.*, 89 F. Supp. 158, 180, F.2d 246, which contained facts similar to those in the "Case" case (habit again), except that there the named insured had made a sale of his automobile and had not retained title for any purpose. The United States Court of Appeals for the Fourth Circuit used this language in holding, in effect, that the sale vitiated the policy:

"Differing with the plaintiff's view, we hold that the protection of the policy was entirely dependent upon ownership by the named insured of the automobile described in the policy. Indemnity was promised against liability whether the car was in the use of the owner or of another with his consent, but only so long as its ownership was vested in the person whose name was inscribed in the policy as the insured. There was no insurance separate and distinct from the ownership of the car. The named insured was insured only as owner of the car mentioned, and the coverage of those using it with his permission was likewise restricted to the period of his ownership.

"The terms of the policy manifest no other intention. The use safeguarded, it is stated throughout the policy, is exclusively and solely a use consented to by the named insured, that is, only his use or his permittee's use. Obviously, when ownership ceased in the insured no use thereafter was by his 'consent'.

"Clause VIII af the policy stipulates: 'This policy applies only to accidents—while the automobile—is owned, maintained and used for the purposes stated as applicable thereto in the declaration.

"This proves that ownership of the car is essential to the applicability of the indemnifying covenants of the policy."

As to the second defense theory, or that Wylie was not in any event an additional insured under the omnibus clause, the Tennessee law is to the effect that a conditional vendor has no right or power as regards the possession or use of the property sold, so long as the conditional vendee is not in default, and that after default the vendor can obtain the possession of the property only with the consent of the vendee or through judicial process[1]. It was thus our position that Case, being without the power to refuse Wylie the use of the automobile at the time of the accident was by the same token without the power to permit it, and that accordingly Wylie's use of the automomile at that time was not with Case's permission within the meaning of the policy. This position was supported by most of the few cases which we found on the question[2]. The plaintiff countered with the proposition that when Case conditionally sold the automobile to Wylie he gave Wylie permission to drive it, that the policy contained no language which specified when or under what circumstances the necessary permission was to be given, and that hence Wylie's use of the automobile at the time of the accident was with Case's permission. The plaintiff relied strongly upon the additional proposition that the policy language in question was ambiguous.

In its opinion[3], the Tennessee Supreme Court limited its consideration of the case to the single question whether the conditional vendee, Wylie, was an insured under the omnibus clause of the policy at the time of the accident and held that he was not. The judgment entered against the insurer in the lower court was accordingly vacated and the case dismissed. Certain language which is contained in the opinion would indicate that while the victory was not a hollow one it was a rather narrow one. Thus, consider this language:

> "Delia Bowers is not making a claim against the Insurance Company by reason of any contract of insurance which she had with it, nor has she any claim through the insured, William Case. Wiley [sic], the person with whom Case had a contract of sale, is making no claim. The plaintiff, Delia Bowers, therefore, cannot rely on the rule that when a policy of insurance is ambiguous in any of its terms, the policy is to be construed in favor of the insured and against the insurer."

Whether we agree with the soundness of the language is immaterial. It is there. All of which points up the fact that the insurance lawyer has a hard row to hoe.

[1]Tennessee Code, Sect. 7287; *Murray v. Motor Truck Sales Corp.*, 160 Tenn. 141, 22 S.W. 2d 227; *Mitchell v. Automobile Sales Co.*, 161 Tenn. 1, 28 S.W. 2d 51.

[2]*Virginia Automobile Mutual Ins. Co. v. Brillhart*, 187 Va. 336. 46 S.E. 2d 377; *Whitney v. Employers Indemnity Co.*, 200 Iowa 25, 202 N.W. 236; *Merchants Mutual Casualty Co., v. Pinard*, 87 N.H. 473, 183 A. 36. Seemingly to the contrary is *Votaw v. Farmers Automobile Inter-Insurance Exchange* 15 Cal. 2d 24, 97 P. 2d 958.

[3]194 Tenn. 560, 253 S.W. 2d 750, 36 A.L.R. 2d 668.

Ownership, Maintenance and Use

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THE subject of this discussion is the scope and extent of coverage afforded by the insuring language of the uniform Standard Automobile Liability Policy, as follows:

> "Arising out of the ownership, maintenance and use of the automobile".

To comprehend and fully embrace the scope and meaning of this hazard or risk describing language, one must also connect up the language found elsewhere in the

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policy defining the "purposes of use" in which the following appears:

> "Use of the automobile for the purposes stated includes the loading and unloading thereof".

The purpose of this discussion is to attempt some rationale of the decisions construing the insuring agreement, "arising out of the ownership, maintenance and use of the automobile". The loading and unloading aspect of this subject is so integrally connected with the "use" of the automobile that mention is made thereof merely to state and embrace the complete insuring language of the policy. No attempt will be made to discuss the loading and unloading aspect of this subject as to do so would unduly extend this discussion and be merely repetitious of some very excellent and comprehensive articles on the subject.[1]

Suffice it to say, in this respect, that the coverage afforded by the loading and unloading clause will be extended or circumscribed, depending upon whether the state in question has adopted the coming to rest or the completed operations doctrine.

Mr. Sawyer's work on the standard automobile policy, "Automobile Liability Insurance", (McGraw-Hill), discusses the intent and purpose of using the phrase "arising out of" and the "ownership, maintenance and use", in the following language:

> "The phrase, arising out of, requires only one comment. The language was chosen because of its inclusiveness. The purpose is to provide insurance protection against liability or alleged liability which grows out of ownership, maintenance, or use of the automobile. The protection is as broad as the insured's liability".

As to the phrase, "ownership, maintenance or use of the automobile", Mr. Sawyer states as follows:

> "Perhaps the word 'use' would have been adequate to meet all requirements within the intent of the policy. But because the language adopted has been used in the past by many companies, and because there is a general feeling that each of the three words "OWNERSHIP, MAINTENANCE AND USE" connotes something not included in the other two, it has been included in the standard provisions. These words express the intent to protect the policyholder under all circumstances regardless of the identity of the operator, subject to the exclusions and other provisions of the policy".[2]

This circumscribing phrase was chosen to replace the word "operation" which appeared in many of the earlier forms of automobile liability policies. This term, being a word of limitation, was construed as requiring some personal physical management of the automobile. With the advent of the automobile becoming a necessity in our society and economy, and also the means of inflicting injuries upon millions annually and killing and maiming many more people than all of the wars combined in which our country has been engaged, the public policy of several states established owners' liability by statute or decision, imposed liability upon parents and others in endorsing a minor's application for an operator's license, extended the family purpose doctrine, evolved new duties and relations in the law of torts pertaining to automobiles and imposed vicarious liability arising out of ownership, maintenance or use of an automobile. From these developments in our law it soon became apparent that the insuring language then in use did not afford adequate protection for the owners of automobiles and others responsible for the maintenance and use of the automobile.

In this respect it should be said to the credit of the underwriting and policy drafting groups representing the stock, mutual and other groups that, notwithstanding the all too general prevalent belief that insurance policies are designed to "give you coverage in the large print and take it away from you in the fine print", the motive and intent of the underwriting groups and policy drafting committees is to afford the broadest possible coverage for the insuring public and to gauge the rate commensurate with the hazard. As further evi-

[1] Scope of "Loading and Unloading" clause of Automobile Insurance Policy, John H. Anderson, Jr., XVIII Insurance Counsel Journal p. 355, October, 1951.

What Protection is Afforded Under Loading and Unloading Clauses, Gibson B. Whitherspoon, XXI Insurance Counsel Journal p. 67, January, 1954.

[2] Automobile Liability Insurance, An Analysis of the National Standard Policy Provisions, E. W. Sawyer.—McGraw-Hill, New York, 1936, p. 70.

dence of this, the underwriting committees are constantly broadening the policies by eliminating exclusions and other policy language which tends to limit or restrict the coverage to a lesser degree than is required for adequate protection for the insured. The most recent evidence of this is the fifth revision of the National Standard Automobile Liability Policy which became effective April 1, 1955.[3]

The language of the phrase under discussion is broad, clear and concise, hence no further elaboration in this respect is necessary. The issues and questions that have been presented and decided by the courts where the scope of coverage has been under consideration turned on the views and precedents of the particular state and court on the issues of causation, proximate and remote cause, foreseeability and whether under varying circumstances an intervening cause may have broken the chain of causation as well as whether such issues are applicable at all to contract as distinguished from tort liability.

A discussion of the cases will point up the application of these principles to the facts of the case at bar and the legalistic reasoning and analysis of the courts in arriving at their decisions.

In reaching a decision as to whether the facts of an accident come within the purview of the insuring language or not, the basic keystone of fact on which liability has turned is whether the injuries were caused by or resulted from a chain of circumstance or causation which inhered in and arose out of the automobile itself or was in direct connection with the maintenance or use thereof or otherwise. In some instances when the automobile was merely a condition and only remotely connected with the occasion and cause of the loss, either in time or place or circumstance, the courts have held the accident did not come within the coverage intended to be afforded by the policy. In the decisions that will be discussed herein, it will be observed, that it was in the application of one or more of these principles that distinguished and determined whether or not the facts under consideration came within the scope of the insuring language "ownership, maintenance or use" of the automobile.

[3]Fire Casualty and Surety Bulletins, The National Underwriter, Cincinnati, April 1955, Auto (Casualty) A - 1 - 3, DB 1 - 6. Auto (Fire) A-1-AC-2. April 1955 — Rough Notes, Indianapolis.

Discussion of the decisions construing this basic insuring agreement will be in categories citing some leading cases construing the scope and meaning of the words "ownership—maintenance—use".

One of the earliest cases dealing with the ownership aspect is the case of *Fullerton v. United States Casualty Company,* 184 Iowa 219, 167 N.W. 700, 6 A.L.R. 367. In this case an action was brought to recover on the policy the amount of settlement made by the insured. Relief by reformation was also sought, should it be decided that the policy as issued did not cover the insured's liability. The issue was whether the policy was broad enough to cover the insured's liability under the family purpose doctrine while the automobile was being driven by a member of his family. The court held that reformation was unnecessary, in the following language:

> "The contract as written indemnifies the plaintiff against claims for damages * * * by any person or persons by reason of the 'ownership, maintenance or use' of the described automobile. This clearly does not limit the indemnity to claims for damages on account of injuries occuring while the insured is personally using the car, but extends to all claims of that nature made by reason of his ownership or maintenance thereof".

The case of *Abrams v. Maryland Casualty Company,* 85 N.Y.S. 2d 479, 89 N.E. 2d 235, 33 Automobile Cases 28, is of interest in that the case discusses the scope of coverage afforded by the insuring language and the several insurable interests that were covered by the policy other than the ownership of the automobile.

In that case, a truck driver employee of the Linden Milk and Cream Company purchased a truck and inasmuch as the Linden Milk and Cream Company, his employer, advanced the funds to purchase the truck, the truck was registered in the name of the Linden company as security. Linden then obtained an automobile liability policy from the Maryland Casualty Company, insuring against liability arising out of the "ownership, maintenance or use" of the automobile.

During the currency of the policy, the indebtedness on the truck was paid off by the employee and title to the truck was then registered in the employee's name.

Thereafter and while the truck was being used in the business of Linden, an accident occurred. The Maryland Casualty Company contended the policy didn't cover Linden's liability because the accident occurred after the transfer of title to the automobile to the employee. A provision of the policy recited that the policy did not apply "after the transfer of the interest of the named insured" without the written consent of the insurer. In holding that this provision did not modify the insuring agreement, the court pointed out the insurable interests an insured may have in the use of an automobile other than ownership and which were obviously contemplated to be covered by reason of the descriptive and embracive insuring language chosen by the underwriters. In holding the policy covered the insured's vicarious liability the court stated as follows:

> "If Linden's interest—i.e.—was restricted to ownership, then, of course, its transfer of the truck's registered ownership prior to the accident left it without any insurable interest. But we do not believe that Linden had so limited an interest or that this was the only interest insured. In so many words the policy provided insurance against liability caused by accident arising not only out of ownership of the automobile, but also out of its maintenance or use. Quite clearly, the interest insured was more than ownership; quite clearly the policy covered any accident in which the vehicle was used or operated in such a way as to render the insured responsible".

The following decisions may afford the basis for analysis of facts that may come under consideration and assist in arriving at a conclusion whether the particular facts or circumstances would bring the accident or occurrence within the coverage contemplated, or a determination that the occasion is only remotely associated with the automobile as a mere condition or circumstance for which the insurer would not be liable.

The phrase "arising out of" has been a subject of judicial interpretation as intending coverage to a much broader extent than usually contemplated by the application of proximate cause.[4] In this respect the language of the court in the case of *Red Ball Motor Freight v. Employers Mutual Liability Insurance Company of Wisconsin*, 189 F. 2d 374, 36 Automobile Cases 263, is significant:

> "The words arising out of the ownership, maintenance or use of the truck are not words of narrow and specific limitation, but are broad, general and comprehensive terms effecting broad coverage and that they are intended to, and do afford protection to the insured against liability imposed upon him for all damages caused by acts of his employee in charge of the operation or use of the truck, done in connection with or arising out of its use. 'Arising out of' are words of much broader significance than 'caused by'. They are ordinarily understood to mean originating from, having its origin in, growing out of, or flowing from, in short incident to, or having connection with, the use of the car".

In the case of *Nahrbass v. Home Indemnity Company*, D.C. La., (1941), 37 F. Supp. 123, the parents of a boy recovered from the owner's insurer due to liability established on the insured for permitting their son, who was inexperienced, to drive the car, resulting in an accident which caused his death.

In *Schmidt v. Utilities Insurance Company*, 353 Mo. 213, 182 S.W. 2d 181, 154 A.L.R. 1089, it was held that negligence in leaving blocks on the sidewalk used by the truck in unloading coal created liability even though the driver and truck had departed. Liability was predicated on the theory that "the blocks were used as a ramp or a driveway for the truck and as a necessary incident to the movement and use of the truck in the delivery of coal".

In the case of *Merchants Company v. Hartford Accident and Indemnity Company*, (1939), 187 Miss. 301, 188 So. 571, a similar set of facts was involved as to whether an accident which resulted from leaving poles in a road which were used to extricate the automobile from the ditch came within the coverage. In reaching its decision the court made a rather classical statement which has been cited and quoted in many other cases as criteria of the attributes necessary to bring a factual situation within the coverage and as to what factual

[4] "Arising Out of the Use", Royce Rowe, VIII, Insurance Counsel Journal p. 24, July, 1941. *Schmidt v. Utilities Insurance Company*, 353 Mo. 213, 182 S.W. 2d 181.

evolution or development is necessary to terminate the coverage in the following language:

> "Our conclusion under a policy such as here before us is, that where a dangerous situation causing injury is one which arose out of or had its source in the use or operation of the automobile, the chain of responsibility must be deemed to possess the requisite articulation with the use or operation until broken by the intervention of some event which has no direct or substantial relation to the use or operation—which is to say, that the event which breaks the chain, and which therefore would exclude liability under the Automobile Policy, must be an event which bears no direct or substantial relation to the use or operation; and until an event of the latter nature transpires, the liability under the policy exists".[5]

In this respect the case of *Red Ball Motor Freight v. Employers Mutual Liability Insurance Company of Wisconsin,* 189 F. 2d 374, 36 Automobile Cases 263, presents a very interesting question resulting from filling a gasoline tank of a truck from a supply tank. In doing so the driver did not completely turn off the valve from the supply tank. The truck drove away and was some forty miles away from where his truck had been filled when an explosion resulted from gasoline flowing from the supply tank down the city gutters and becoming ignited several blocks away. The policy in question did not have the supplemental insuring agreement that use of the automobile includes the loading and unloading thereof. The company contended that inasmuch as the gasoline which became ignited never was a part of the truck, the accident was not within the coverage. In holding that the policy covered the insured's liability, the court made the following statement:

> "That the cause of the escape of the gasoline, which in unbroken sequence proximately caused the explosion, was the negligent act of the driver of the truck in failing properly to close the valve after he had finished fueling his truck from the tank was not disputed. That there was a direct and proximate casual connection, therefore, between the act causing the escape of the gasoline and the damages the insured had to pay no one denies. That this act of the driver of the tractor, in not closing the valve, was an act incident to, and having a connection with the ownership, maintenance or use of the truck we think may not be questioned. To deny coverage here, under these facts, because the gasoline causing the injury had never been in the truck, would be to limit the policy, contrary to its broadly stated terms and to the weight of authority, to damages or injuries proximately caused by the truck itself, as opposed to acts of the driver in charge of the tractor, done or permitted to be done in connection with the duties or services performed by him, in this case fueling it—incident to and arising out of the ownership, maintenance and use of the tractor".

In this case there is an interesting dissenting opinion emphasizing that the coverage was restricted in that the policy did not contain the language that the use of the truck includes the loading and unloading thereof.

While it is only the writer's conclusion, it would seem that coverage under these circumstances could have been put on a more realistic basis that the accident was caused by doing an act that was necessarily inherent to and intrinsic in the use of the truck as well as the truck itself, as distinguished from its load, and that in no event was the loading or unloading clause involved. This distinction is emphasized in several of the later cases that will be the subject of discussion.

In this respect there is an interesting line of decisions which tend to demarcate and distinguish factual situations which determine whether the occurrence arose out of the inherent nature of the automobile, or use necessary and incidental thereto, or in consequence thereof, as distinguished from

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[5] In the case of *Wheeler v. London Guarantee and Accident,* 292 Pa. 156, 140 A. 855, steel girders were being dragged into a building with power supplied by the truck motor. The girders were not in motion at the time a boy stepped on a girder, causing it to turn and injure his foot. In holding the accident within the coverage, the court stated as follows:

"If the defendant company is to escape liability under its policy, there must have arisen, during the transportation and delivery of the girder by which the boy was injured, a situation by which the service and use of the truck, as well as the truck itself, was entirely and actually severed and disconnected from the actual operation of dragging the girder inside the building to the designated location."

the load being carried, which may have contributed to the accident, or other circumstances involving the use of the automobile which was merely a condition and only remotely connected with the accident.

In the case of *Caron v. American Motorists,* 277 Mass. 156, 178 N.E. 286, ice fell from a truck causing a pedestrian to fall and sustain injuries. In holding the accident not covered, the court held the injury did not result from the truck which was stationary at the time but "resulted entirely from the conduct of the one disposing of the contents of the motor vehicle in a way which, as a matter of common knowledge, was customary in delivering ice".

A fatal accident caused by leaving coal in the street without warning lights contrary to law, was held not to be covered by the automobile policy. *Luchte v. State Auto Mutual Insurance Company,* (1935), 50 Ohio App. 5, 197 N.E. 421.

Oil on a sidewalk which had leaked from a tank truck causing injury, was held not covered as the leaking oil was not peculiar to a motor vehicle as such and intrinsically related to the machine itself, the use and operation of the truck having no connection with the injury. *Ocean Accident and Guarantee Corporation v. J. B. Pound Hotel Company,* (1943), 69 Ga. App. 447, 26 S.E. 2d 116.

Sand and gravel falling from a truck and left on a sidewalk causing injury to a pedestrain was held as not being caused by an automobile within the exclusion clause of a contractor's indemnity policy. *United States Fidelity and Guaranty Company v. Breslin,* (1932), 243 Ky. 734, 49 S.W. 2d 1011.

The distinction between cases where the automobile was only a circumstance or condition remotely or incidentally connected with the injury and cases following the inherent or intrinsic doctrine is manifest in the following decisions.

In *Mullen v. Hartford Accident and Indemnity Company,* (1934), 287 Mass. 262, 191 N.E. 394, the policy was held to cover an accident caused by a person slipping and falling due to oil on the highway which had escaped from a crack in the crankcase. The court in distinguishing the previous case of *Caron v. American Motorists,* supra, stated as follows:

> "In the case at bar there is the necessary connection between the injurious condition of the street and the motor vehicle. The escape of oil was peculiar to automobiles and intrinsically related to the machine itself and not to the load it happened at the moment to be carrying".

Another interesting and distinguishing Massachusetts case is *Perry v. Chipouras,* 319 Mass. 473, 66 N.E. 2d 361. In this case the pedestrian tripped over some short lengths of loops of rope which were permitted to fall from the truck to the sidewalk. In holding that the accident was not covered under the automobile policy, the court stated that the point to draw the line as to coverage, would be when pieces of rope became dissociated with the ownership, operation, maintenance, control or use of the motor vehicle which was when the pieces of rope came to rest upon the sidewalk.

The cases having to do with fires and injuries caused by maintenance of the automobile presents interesting distinctions in applying the inherent and intrinsic doctrine as against the rule of non-liability where the automobile is merely a remote cause or a mere condition, incident to the accident.

In the case of *Roche v. United States Fidelity and Guarantee Company,* 273 N.Y. 473, 6 N.E. 2d 410, an explosion was caused when the insured approached his automobile with a match in his hand to examine the dial of the gasoline gauge. Holding the accident was covered by the policy the court said:

> "The act of the insured in the case at bar in walking toward the tank with a lighted cigarette in his mouth and a lighted match in his hand to examine the dial of the gauge, at a time when visibility must have been poor, was clearly related to or connected with the ownership, maintenance or use of the automobile, * * *. It is our opinion that there was no intervening, independent or proximate cause of the accident other than that incidental to the ownership, maintenance or use of the automobile".

In considering the previously cited *Roche* case, the case of *Hill v. New Amsterdam Casualty Company,* (1925), 211 App. Div. 747, 208 N.Y.S. 235, may be read with considerable interest although, by implication perhaps, the *Hill* case has been overruled by the *Roche* case although the *Hill* case may be distinguishable on its particular

facts, in that the injury evidently was caused by the negligence of the plaintiff himself rather than the insured. In the *Hill* case the garage attendant was injured by an explosion caused by the lighting of a match close to the automobile in question. In deciding the accident was not covered by the policy the court said as follows:

> "The real difficulty with the case of the plaintiff, however, is that the automobile cannot be said to be the proximate cause of the injury, since to make it a proximate cause there must be a logical sequence in a natural course between the automobile and the fire; whereas, the lighting of the match was an independent intervening cause. In other words, the injury could not be said to be caused by the automobile but by the independent negligence of the plaintiff".

The case of *Steir v. London Guaranty and Accident Company,* 227 App. Div. 37 —points out a nice distinction arising out of a case where a match was thrown into an open can of kerosene which was being used to clean sparkplugs. A fire ensued and the can was kicked away from the automobile which caused a child to sustain burns. In the court's opinion it was pointed out that the case could be distinguished from a situation where a spark from an exhaust of an automobile ignited a can of gasoline and where a match was thrown into the can by a bystander which was an intervening act. Holding the injury as not covered by the policy, the court stated as follows:

> "It is clear that the mere presence of an open can of kerosene in connection with its use in cleaning the sparkplugs, would not have so resulted in injuries to the infant plaintiff. Nor could it reasonably be expected, according to the common experience and the usual course of events, that a lighted match would be thrown into a can of gasoline. The proximate cause of the accident, therefore, was not the open can of kerosene but the throwing of the match therein. The injury cannot be said to have been caused by the cleaning of the automobile, but by the independent negligence in the throwing of the match".

The sequence of events arising out of maintenance of an automobile coming within the coverage of the clause under consideration is emphasized in the case of *United Insurance Company v. Jamestown Mutual Insurance Company,* 242 App. Div. 420, 275 N.Y.S. 47, 196 N.E. 587, in which other automobiles in a garage were damaged by a fire resulting from upsetting a can of gasoline the assured was using in working on his car, the gasoline subsequently coming into contact with a stove. In this case there obviously was no break in the line of causation or intervening cause, inasmuch as the fire resulted directly and intrinsically from maintenance of the automobile itself.

Another case involving the issue of proximate cause in connection with injuries sustained from a sequence of events emanating from maintenance of the automobile is *Milan v. Vincent,* Ga. (1936), 188 S.E. 577, where the motor was started while another party was pouring gasoline in the carburetor causing gasoline to be thrown on a pedestrian.

Permitting a child to alight from a bus on a busy highway and who was subsequently struck by a passing automobile while the child was crossing the road has been held to be within the coverage arising out of the use of the automobile. *Western Casualty and Surety Company v. Independent Ice Company,* 190 Ark. 684, 80 S.W. 2d 626, and *Earl W. Baker Company v. George A. Lagaly,* (C.C.A. 10, 1944), 144 F. 2d 344.

The case of *Handley v. Oakley,* (1941), 10 Wash. 2d 396, 116 P. 2d 833, is interesting in that it points out a circumstance where an automobile was only remotely associated with an injury sustained and hence, being a mere condition rather than a cause, the injury was held not to be within the coverage of the automobile policy. In that case a truck had been used to convey some children to a picnic and was parked near a ball field. While a child was standing near the truck, a foul ball struck the child, causing injury.

The case of *Suburban Bus Company v. National Mutual Casualty Company,* (Mo.), 183 S.W. 2d 376, involves a factual circumstance where it might well have been held that the automobile itself was a mere condition and that the cause of the accident was entirely dissociated from the use of the automobile as such. However, the court held the injuries were within the coverage inasmuch as they arose out of the ownership, maintenance or use of

the automobile. In that case, the automobile was being used as a school bus and children in the bus were using water guns to squirt water on each other. The bus driver, in endeavoring to stop the children squirting the water, picked up the fire extinguisher on the truck, pointed it towards the children, which caused fluid to come out of the extinguisher resulting in injuries to one of the children on the bus. The injury was held to be covered by the policy.

An extraordinary circumstance setting up a chain of events and involving the rescue doctrine is presented in the case of *Lynch v. Fisher,* a Louisiana case reported in 29 Automobile Cases 479 and 32 Automobile Cases 710. Truck owners were held liable for parking on the highway and subsequent injuries to a rescuer who was shot by a motorist who collided with the insured's truck and who became temporarily deranged on account of injuries sustained by his wife. The contention was made that the firing of the pistol was an independent intervening cause which broke the causal chain from the original negligence of the truck driver in improperly parking his automobile. It was further contended that the following shooting could not reasonably have been foreseen. The court, however, held that the ultimate injury resulted in a sequence from the original negligence of the truck operator and that the temporary insanity was not a superseding cause and that the theory of foreseeability was not applicable. The degree of proximity of the injured person to the use of the automobile is set forth in the case of *Forgion v. Travelers Insurance Company,* 12 N.Y.S. 2d 26, 171 Misc. 163. In this case, injury to a prospective bus passenger was held to be within the coverage where a stanchion and chains were in proximity to the entrance to the bus, resulting in injury. It was held the accident arose out of the ownership, maintenance and use of the bus.

The scope of the defense provision of the policy applicable to the basic coverage of ownership, maintenance and use is presented in the case of *Morgan v. New York Casualty Company,* 188 S.E. 581 54 Ga. App. 620. The facts involved injuries resulting from a coal chute being left open following delivery of coal. In construing these two features of coverage, the court stated as follows:

"This contract of insurance should be given a reasonable construction in accordance with the intention of the parties, and so as to carry out and accomplish the object and purpose thereof. A suit which the insurance company would be liable to defend, under the terms of the policy, would have to be one for damages resulting from the maintenance or use of the truck as provided in said policy. * * * It will be noted that the automobile truck is in no way mentioned or referred to in the Freeman suit. Nor does he claim therein that his injuries resulted from the negligent operation or use of said truck in any way. * * * So far as the allegations of the petition show, coal may have been hauled to the coal chute in a wagon or rolled there in a wheelbarrow. * * * So it clearly appears from the petition that the proximate cause of his injuries was not from use or the operation of the truck in transporting materials or merchandise or loading or unloading, but that the proximate cause of his injuries was his falling into the open and unattended coal chute as therein alleged".

London Guarantee and Accident v. Shafer, 32 F. Supp. 905, 8 Automobile Cases 364, presents an interesting discussion as to the obligation of both the general liability insurer and the automobile insurer to defend the insured based upon allegations of the complaint and even though the suit is groundless. The court held as follows:

"The obligation to defend is to be determined when the action is brought, and not by the outcome of the action. The language of the insurance contract must first be construed and next the allegations of the complaint in the action against the insured. Where the obligation is to defend the action, whether the action is groundless or not, the insurer is liable for failure to defend an action in which the complaint shows a claim for damages covered by the policy. * * * The petitions stated claims which were covered by both policies".

The assault cases have produced some interesting and to some extent conflicting decisions which appear to be somewhat irreconcilable but may be distinguishable due to the variance in the facts before the court in each case.

National Mutual Casualty v. Clark, decided by the Mississippi Supreme Court

(1942), 7 So. 2d 800, 14 Automobile Cases 685, is a rather interesting and comprehensive case as to the scope of coverage afforded by the policy in connection with the use of a taxicab pursuant to a city ordinance. To qualify under the ordinance a policy was furnished containing the identical insuring language under consideration. The assault in question took place following the passengers' alighting from a taxicab. It was contended the use of the taxicab was casually related to the assault and injury. The court cites and discusses a number of cases involving coverage afforded by assault but distinguishes the facts of this case in the following language:

> "We do not mean to hold that injury from assault may never be covered by such a policy, but that in any event the vehicle must be an active accessory. Liability is denied not because an assault was a factor in the injury but because the operation and use were not factors in the assault. * * * The original use of a taxicab, brought to rest at the completion of its journey, is at most a cause sine qua non and our examination as to the appellant's liability may go no further than the terms of its policy. It is not in point whether the assault was related in time or place to the completed use of the taxicab. The test is whether it is causally related to its actual operation. The missing link in the chain of causation is such use or operation".

This opinion is interesting in many aspects as a number of previous decisions are cited and discussed and also decisions construing an assault as applicable to general liability policies. A dissenting opinion was filed in this case, reasoning that casual re lation was established as having arisen out of the use of a taxicab as such.

Huntington Cab Company v. American Fidelity and Casualty Company, 155 F. 2d 117, 25 Automobile Cases 130, emphasizes the cleavage in the decisions pertaining to an assault being within the coverage. The cases cited also discuss whether an assault is an accident, which affords an interesting discussion but is not pertinent to the subject under consideration.

In the *Huntington* case the assault was committed by the taxi driver upon a passenger without provocation or reason and without the knowledge or authorization of his employer.

The decision by Chief Judge Soper is quite comprehensive and much citation and quotation from other decisions is contained in his opinion. While much comment generally appears in the opinion, the court confines his reasoning to the issue of causation arising out of the use of the vehicle as a taxicab rather than the automobile itself in the following language:

> "Why should the liability of the casualty company to the cab company depend upon whether the cab itself participated physically in the passenger's injury? The only answer afforded is under the policy the injury must occur by reason of the ownership, maintenance or use of the cab. These terms do not in our opinion require that the automobile itself produce the injury as is suggested in the decisions upon which the District Judge relied. They are equally satisfied if the injury is incidental to or grows out of the relationship of carrier and passenger which in this form of transportation necessitates personal dealings and contact between the driver and the passenger in the use of the cab. Whether the driver inflicts an injury upon the passenger by reckless management of the vehicle, or so far forgets his duty to carry passengers safely as to inflict an injury upon him by physical violence, in either case the injury is made possible and derives from the use of the cab".

The court then states that the choice lies in the difference of interpretation of the insuring language as pointed out in previous decisions and then reverses the trial judge and remands the case for further proceedings in accordance with the court's opinion.

Incidentally, one interested in a very analytical and comprehensive discussion of this subject and numerous cases cited and quoted from will find the district court's opinion interesting reading. It is reported in 63 F. Supp. 939, 24 Automobile Cases 595.

A rather unusual aspect of this question of coverage is dealt with in the case of *Columbia Casualty Company v. Apel* (C.C.A. 10) 171 F. 2d 215, 30 Automobile Cases 692. In this case an attempt on the part of an occupant of an automobile to avoid an assault was held to be within the use of the automobile in that the automobile was caused to swerve under circumstances imposing liability on the insured.

The court held that the injuries sustained resulted from a fall which arose, at least in part, out of the operation and use of the automobile and, hence, was within the insuring agreement of the policy.

Barringer v. Employers Mutual Liability Insurance Company, (La.) 62 So. 2d 173, 1 Automobile Cases 2d 706, is a case where an assault upon a taxicab passenger was held not covered by the policy inasmuch as the passenger's connection with the vehicle as a taxicab had terminated at the time the assault took place. The court in emphasizing distinguishing circumstances where the passenger status may not have terminated stated as follows:

> "The test as to when a passenger for hire status ends, we think, depends upon the circumstances of each individual case. It is frequently held that if the passenger has not been entirely discharged as such, as for instance where baggage has not been delivered, the contract of carriage is not complete and the master's duty of care still remains. Another reason for liability of the carrier occurs where the difficulty resulting in injury arose during the course of the journey. In the instant case the appellant readily admits that the controversy with Sims did not start until he had definitely quit the taxi and that the assault was provoked because Sims wished him to re-enter the cab.
>
> "These reasons, we think, as well as the evidence, abundantly support the ruling of the trial judge to the effect that at the time of the alleged assault, the plaintiff was no longer a passenger for hire. There was, therefore, no duty of care due him by the employer of the taxicab driver. It also follows that if plaintiff was assaulted by the cab driver after the contractual relationship between the plaintiff and the defendant's insurer had ceased, the driver was acting beyond the course and scope of his authority in not performing any function for which he was employed".

In conclusion, however, the court did state, perhaps by way of obiter, that the policy of insurance would cover any assault and battery committed by an employee of the insured acting within the scope of his authority.

A rather unusual factual situation is presented in *Commercial Casualty Insurance Company v. Tri-State Transit Company,* (La.), 1 So. 2d 221, 10 Automobile Cases 846. In this case, following a breakdown of the bus, a passenger was obliged to walk in damp and cold weather to her work from which she contracted a cold resulting in pneumonia. Contentions were made that her exposing herself to the inclement weather was a voluntary act and that the cold and pneumonia complication was entirely unforeseen and not according to the usual course of events. In discussing the point whether it was necessary that the use of the automobile be the proximate cause of the accident or not, the court stated as follows:

> "In the case at bar the policy sued on is silent as to whether an injury for which the insurer can be held liable must be the proximate result of the accident complained of. The situation which rendered it necessary for Pinkie Laws to expose herself to the cold and inclement weather while necessarily walking to her destination as alleged, arose out of, or had its source in, the accident which resulted from the use or operation of the automobile bus, and the chain of circumstances which followed the stopping of the bus bore a direct or substantial relation to the accident which resulted from the use of the same, since the failure of the carrier to transport the passenger to her destination was directly and proximately connected with the incapacity of the bus to proceed further on in this journey because of the accident".

An unusual case is presented dealing with the respective or concurrent liability of insurers covering the premises as well as the automobiles of the insured where the insurers are different and the accident occurred on the premises in connection with the use of the automobile. It is *Employers Casualty Company v. Hicks* (Tex.), 160 S.W. 2d 96, 13 Automobile Cases 1006. An automobile owned by the Hicks Rubber Company had driven up to the curb adjacent to its premises and an automobile tire was thrown from the truck, striking a pedestrain, causing injuries. The questions were which insurer was liable and whether there was other or concurrent insurance, the latter issue not being pertinent to this discussion.

On the liability of the automobile insurance carrier, the court stated:

"It is clear that the liability imposed by law upon Hicks for the injuries sustained by Mrs. Harper arose out of the ownership, maintenance or use of the truck, the specific operation of which was insured under the trader's policy. But for the use which was being made of the truck and negligence of the employee which was committed in said truck, no legal liability could have been imposed upon Hicks for the injuries which Mrs. Harper sustained merely because she was proceeding along the public sidewalk in front of the Hicks place of business at the time when she was injured".

The oil cases present a conflict of authority and have involved in addition to the use of the automobile the loading or unloading aspect of coverage. The division of authority is exemplified in the case of *Maryland Casualty Company v. United Corporation,* 35 F. Supp. 570, 8 Automobile Cases 1084. In this case oil was delivered into an apartment house fuel tank at about 9:30 A.M. At about 10:30 A.M. the same morning an explosion occurred, causing injury and damage to the apartment house. Later while the fuel oil was being pumped out of the tank, leaks were observed in the bottom of the tank and that buckets had been placed under the tanks to receive the leaking oil. As to whether or not the fire resulted from the use of the truck, the court stated as follows:

"I am unable to find that the explosion and fire in the Dunham Apartment House was caused by or connected with the unloading of oil from the United Company truck into the tank in the apartment house. The function of the truck was to deliver oil to the apartment house. This it did and, having completed its delivery, drove away. The explosion which occurred after the truck had left the premises was not something that arose out of the ownership, maintenance or operation of the motor vehicle or by the loading or unloading of merchandise carried on such vehicle".

The converse of this proposition is set forth in *General Accident Fire and Life Assurance Corporation v. Hanley Oil Company,* 321 Mass. 72, 72 N.E. 2d 1, 171 A.L.R. 497. In this case, damages resulting when fuel oil being pumped into a householder's cellar tank overflowed and became ignited without human agency intervening. It was held this was within a policy insuring the truck owner from liability for property damage caused by accident and arising out of the ownership, maintenance or use of the truck. This is a rather interesting case and accompanied by a comprehensive note having to do with other instances where fires or explosions have arisen in connection with the maintenance or use of the automobile, several of which are cited in this discussion.

The so-called "ambulance" or "stretcher" cases present a contrast in decisions and the application of the rules of causation and remote consequences to the facts under consideration. The presence or absence of the loading or unloading provision may somewhat account for the conflict of decisions on this point.

In one such case the distinction is emphasized that one operating an ambulance as a business may incur liability arising out of and incident to the business and as distinguished from the use of an automobile as an ambulance itself. The accident was caused from dropping the stretcher while the sick person was being carried from her bed to the street. The ambulance had not as yet been reached. In reaching its decision the court stated as follows:

"If the accident assigned by Mrs. Hall as the cause of her injury had occurred while the stretcher was being placed in the ambulance or while it was being removed therefrom, we would be strongly inclined to hold it the result of the use of the ambulance. But the authorities and liberal rule of construction cited do not, in our opinion, justify the further extension of the terms of the contract, so as to include the accident in suit. When the stretcher was dropped, the ambulance had not been reached. Mrs. Hall was being transported to the ambulance and not by it or on it. The transportation of sick persons from bed to street and curb was a necessary incident to the conduct of complainant's business of operating an ambulance for hire, but was not a necessary incident to the operation or use of the ambulance as a motor vehicle, as the actual placing or removal of persons therein and therefrom would be. Complainants were insured against liability arising from the operation and use of the vehicle, and

not against liability rising from the conduct of their business. * * * The hazard of the transportation of persons to the ambulance was not within the terms of the contract and was not assumed by the insurer." *Hinton and Sons v. Employers Liability Assurance Corporation,* 166 Tenn. 324, 62 S.W. 2d 47.

The case of *Owens v. Ocean Accident and Guarantee Corporation,* 194 Ark. 817, 109 S.W. 2d 928, reaches a different conclusion on similar facts and holds that the hazard of a stretcher accident, before reaching the ambulance, arose out of the use of the automobile as an ambulance as distinguished from the *Hinton* case, supra, which held that such hazard was incident to the business of operating an ambulance rather than arising out of the use of the automobile as such in the following language:

"'Ownership, maintenance and use' are general terms. These words were selected by the insurer to indicate or circumscribe the scope of coverage contemplated; and, where such expressions are adopted, it is not a perversion or extension of the contract, when applied to the instant case, to say that, although use of the stretcher to convey Mrs. Mason from her home to the waiting ambulance was not a necessary incident to use of the automobile as a motor vehicle, it was an essential transaction in connection with use of the automobile as an ambulance. When we add to these conclusions appellee's knowledge that the vehicle insured was, by express terms of the contract, to be used as an ambulance, it necessarily follows that any transaction so closely identified with the operation of the vehicle as an ambulance as to form a link in its general utility and functions would fall within the purview of the risk insured against, and appellee would become liable".

The coverage afforded by the descriptive word "use" is probably inherent in the other two words of the phrase "ownership and maintenance". Mr. Sawyer in his work, supra,[3] circumscribes the word "use" as follows:

"Perhaps the word 'use' would have been adequate to meet all requirements within the intent of the policy. But because the language adopted has been used in the past by many companies, and because there is a general feeling that each of the three words 'ownership, maintenance and use' connotes something not included in the other two. It has been included in the standard provisions".

Appleman describes the word "use" as follows:

"The term 'use' is the general catch-all of the insuring clause, designed and construed to include all proper uses of the vehicle not falling within one of the previous terms of definition. It is limited to the purpose for which the coverage is designed, namely, that the vehicle (1) must be used for the purpose set forth in the Declarations; (2) must be pleasure or business or commercial as defined in the policy."—7 *Appleman Insurance Law and Practice,* Section 4316.

An example of the extremely broad interpretation that has been given to the word "use" is exemplified in the case of *American Automobile Insurance Company, v. Taylor,* 52 F. Supp. 601, 20 Automobile Cases 52. In this case the insured's wife and son, the latter being expressly prohibited from using the car, were at a filling station having a battery charged. The attendant requested the car be started and the son got into the car before the mother could stop him and stepped on the starter, causing the car to lunge forward, injuring a pedestrian. A question of coverage arose as to the use being made of the car at the time. The court held that the car was actually being "used" at the time of the accident by the owner through the agency of his wife and son to have the battery recharged since he had directed the recharging and replacing anyone carrying out this direction was using the car on his behalf. The court further held the boy in starting the motor at the general request of the garage employee was the implied agent of his father and that the car was being used by the named insured in and about his business of providing a workable battery for the car.

The court by way of analogy as to under what circumstances the named insured would be using the car and as examples of the doctrine of implied agency, stated as follows:

"The situation is analogous, in my opinion, to the implied agency that would exist if the boy were washing the car or changing a tire thereon in the necessary task of maintaining the car in a presentable and usable condition, and without specific direction from the father to do so. In none of these instances is the son operating the car or himself using it. The use is that of the father who is the named insured".

Another case expressive of the very broad interpretation that has been given to the word "use" is *Brown v. Kennedy,* 141 O.S. 457, 48 N.E. 2d 857, 15 Automobile Cases 1133. This case has to do with the omnibus clause and to the effect that the first permittee was still using the car even though the car was being driven by a second permittee at the time of the accident. In construing the word "use" the court made the following significant statement:

"In the instant case the terms in question are 'use' and 'using'. Now a car would be used by a person, whether it was operated personally or through the services of another. If the insurer meant the liability should only attach when it was being operated or driven by the owner or someone with his consent, and it is claimed the word 'used' includes the term 'operated', then the insurer should have employed the word carrying in its meaning the narrow limitation of liability.

"The word 'use' is defined as 'purpose served—a purpose, object or end for useful or advantageous nature'. This implies that the person receives a benefit from the employment of the factor involved. It is this benefit, purpose, or end which defines the use. I use a chisel to chip out a piece of wood. The removal of the wood is the use to which I put the tool. I use a book for the purpose of transmitting the thought of the author to my brain. It is used as a vehicle for thoughts or ideas. I use a pen or pencil to draw a sketch or write a letter. The pen or pencil is thus an instrument by which I receive the benefit of having a diagram or thought in my brain impressed upon the paper. I employ an automobile for the purpose of transportation. I use it for the purpose of going from here to there. It is immaterial as far as this use, this benefit, this purpose, this end is concerned whether in so acquiring this benefit I actually operate the driving mechanism of the vehicle or employ another to do it".

Another case in this respect is *Liberty Mutual v. McDonald,* 97 F. 2d 497. See also the case of *Jones v. New York Casualty Company,* (D.C.Va.), 23 F. Supp. 932.

Two other interesting cases interpreting the word "use" as applied to a first permittee who was not operating the vehicle at the time of the accident are *Harrison v. Carroll,* 139 F. 2d 427, 19 Automobile Cases 537, and *Hardware Mutual Casualty Company v. Mitnick,* 26 A. 2d 393, 15 Automobile Cases 74.

From the holdings of these cases it appears the named insured or the additional insured's liability may arise out of any reasonable, customary or foreseeable use whatsoever of the automobile, and that the use need not be actual but may be constructive use as is manifest from the holding of the courts in the cited cases. To perhaps state the proposition a more comprehensive way, it may be said from the holdings of the cases that the insured's or owner's liability may be established by contract or status through the doctrine of agency, even though implied, or tort liability arising out of a duty to operate and maintain the vehicle so others may not be injured, and likewise statutory liability being imposed upon the owner either through public policy being manifest by statute or decision. It, therefore, is obvious it would be impracticable, if not impossible, to attempt to circumscribe the scope of liability that may be, by construction, held to be within the contemplation of the innocuous little three letter word "use".

Generally, it may be logically concluded that the insuring language under discussion is broad enough to embrace any liability imposed upon the insured which arises directly and proximately from the ownership, maintenance or use of the automobile, or was naturally and reasonably incidental thereto or in consequence of the use of the automobile. However, remote consequences or acts not inherent in the ownership or intrinsic in the automobile itself, or where the automobile is a mere circumstance or condition, are not within the contemplation of the parties as being embraced in the insuring language. Consequently, acts not within the line of cau-

sation, or as one court has expressed it, having "requisite articulation" with the automobile itself, are not within the coverage intended to be afforded.[6]

Appleman summarizes the scope of coverage afforded by the phrase "ownership, maintenance and use" and states the three essential rules that have been established by the decisions to determine whether the facts under consideration come within the coverage. Inasmuch as Mr. Appleman's language tersely and concisely circumscribes the scope of the question under consideration, I know of no better finale than his words:

"Three interesting rules have been set up to determine the insurer's liability. 1. The accident must have arisen out of the inherent nature of the automobile. 2. The accident must have arisen within the natural territorial limits of an automobile, and the actual use, loading or unloading, must not have been terminated. 3. The automobile must not merely contribute to cause the condition which produces the injury, but must, itself, produce the injury."[7]

The classical statement, "Out of the facts the law arises," is apropos here. Perhaps the cases cited here may assist to some extent in determining the "law of the case" that may arise out of the facts under consideration.

[6] *Merchants Company v. Hartford Accident and Indemnity Co.*, (1939), 187 Miss. 301, 188 So. 571.

[7] Insurance Law and Procedure, Appleman, Vol. 7, p. 86, notes 52 to 54.

Re-Birth of the Juvenile Tort

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THE importance of tort law is finding new impetus in the expanded sales of personal comprehensive liability policies. Five to ten years ago, the blackened eye or bruised leg was a quickly forgotten incident in the life of the average youngster. Situations of this kind were infrequently litigated, comparatively speaking, and for numerous reasons, primarily important of which was the usual inability of the child to respond in damages. Such is no longer the case where the parents of the injured minor become aware of the presence of a personal comprehensive liability policy maintained by the parents of the other participating minor.

There are countless ways and means for children to injure one another in the course of their recreation, many of which are cognizable under this type of insurance policy. The difficulty in advising clients lies in the dearth of legal authority construing and interpreting this relatively new policy. Therefore, it seems fitting to review the field of law of minor's torts in the light of certain provisions of the personal comprehensive liability policy.

The first step is to set out several policy provisions which are both pertinent and typical:

INSURING AGREEMENTS

I. COVERAGE A— LIABILITY

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, and as damages because of injury to or destruction of property, including the loss of use thereof.

II. COVERAGE B—Usually provides medical payment protection more limited in scope and monetary amount. We are not concerned with it here.

III. DEFINITION OF INSURED

The unqualified word "insured" includes (a) the named insured, (b) if residents of his household, his spouse, the relatives of either, and any other person under the age of twenty-one in the care of an insured, (c) with respect to animals and watercraft owned by an insured, and (d) with respect to farm tractors and trailers and self propelled or motor or animal drawn farm implements, any employee of an insured while engaged in the employment of the insured.

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There are a number of exclusions specifying circumstances under which coverage is not afforded. Pertinent to our discussion is the exclusion relating to injury caused intentionally by or at the direction of the insured. This would appear to eliminate the field of intentional torts. However, it is to be anticipated that serious effort will be made by plaintiffs' counsel to expand what conduct is classified negligent at the expense of that classified intentional. There will also be serious problems on testimony from both the plaintiff and the insured, both seeking to retain the benefits and protection of coverage. Therefore, prompt investigation and especially the insured's statement is important.

With the exception of an exclusion relating to automobiles, certain types of water and aircraft, the remainder of the exclusions would not ordinarily involve children.

As you will see below, the intentional juvenile tort generally results in liability against the child. In some instances, it can be imposed on the parents where the child has been entrusted with a dangerous instrumentality. However, because of the exclusion described above, the insurance carrier avoids the loss. We mention this for two reasons: First, to emphasize the importance of prompt investigation to avoid the post meditated transformation of an intentional tort to a negligent one, and secondly, to redirect your attention to the benefits enjoyed by minor defendants in the negligence field. In order to survey the problem adequately, we shall review the juvenile tort generally before turning off into the negligence field.

The standards of care set down under the law for children in this state are adequately set forth in the *Restatement of Torts,* Volume 2, Section 283, Comment "e", as follows:

> "e. Children. A child of tender years is not required to conform to the standard of behavior which it is reasonable to expect of an adult, but his conduct is to be judged by the standard of behavior to be expected from a child of like age, intelligence and experience. A child may be so young as to be manifestly incapable of exercising any of those qualities of attention, intelligence and judgment which are necessary to enable him to perceive a risk and to realize its unreasonable character. On the other hand, it is obvious that a child who has not yet attained his majority may be as capable as an adult of exercising the qualities necessary to the perception of a risk and the realization of its unreasonable character.
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> "Between these two extremes there are children whose capacities are infinitely various. The standard of conduct required of such a child is that which it is reasonable to expect of children of like age, intelligence and experience. Insofar as concerns the child's capacity to realize the existence of a risk, the individual qualities of the child are taken into account. If the child is of sufficient age, intelligence and experience to realize the harmful potentialities of a given situation, he is required to exercise such prudence in caring for himself and such consideration for the safety of others as is common to children of like age, intelligence and experience. The fact that a child is habitually reckless of the safety of himself and others to a degree unusual in similar children, does not excuse him.
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> "It is impossible to fix the definite age at which children are capable of negligence or to fix the age at which a child, or any class of children, is able to appreciate and cope with the dangers of any particular situation. A child of ten may in one situation have sufficient capacity to appreciate the risk involved in his conduct and realize its unreasonable character, but in another situation he may lack the necessary intelligence and experience to do so."

There is an excellent annotation on the subject of liabilities of infants for injuries inflicted at play contained in 173 A.L.R. 890, et seq. Liability appears to have invariably resulted in the course of juvenile conduct involving intentional wrongdoing and pranks. There are a number of cases listed in 173 A.L.R., commencing on page 891, in which children were held liable for such things as shooting arrows and injuring eyes thereby, injuring animals by sudden explosion of fireworks, playing with and causing injury with firearms, etc.

There are a number of cases describing circumstances in which infants are not liable and listing situations in which infants have been engaged in such games as tag, etc.

In order to narrow down the problem with which we appear to be confronted under the circumstances, it is fitting to review a few typical cases.

In *Vosburg v. Putney*, (1891), 80 Wis. 523, 50 N.W. 403, a child was held liable for injuries inflicted as a result of a kick upon the leg of the plaintiff, occurring in a school room and while school was in session. The court found liability on the theory that the injury was the result of an unlawful and wrongful act notwithstanding that no intention to do harm was involved. This case appears to fall within the category described above where liability results from intentional misconduct on the part of the child.

The same result, based upon the same theory, is found in *Horton v. Wylie* (1902), 115 Wis. 505, 92 N.W. 245, wherein the defendant, a boy of 15 years of age, had a loaded revolver, and in the company of the plaintiff, a boy about the same age, was playing cowboy. Each of the boys in turn were pointing uncocked revolver at the other. Finally the defendant pointed the revolver at full cock at the plaintiff who struck it up with his hand, thereby discharging the same and injuring him. The court found that liability existed on the theory that the defendant was violating the statute forbidding a minor to go armed and making it an unlawful act for one to point a revolver at the other.

Passing now to the cases falling under the other category above described and not involving intentional misconduct or violation of existing laws, we find the widely cited case of *Briese v. Maechtle*, 146 Wis. 89 (1911). That case involved a boy between eleven and twelve years of age who, without any malice or intent to do wrong, and while being chased in a game of tag in the school yard during a recess period, accidentally ran into and injured a younger schoolmate who was playing marbles in the yard. The lower court had granted a nonsuit in the action, which was affirmed on appeal upon a determination by the supreme court that the evidence failed to sustain a finding of actionable negligence. After commenting and restating the well established rule that a minor is responsible for compensatory damages resulting from his torts in the same manner as an adult, the court recognizes and distinguishes the rule and situation in *Vosburg v. Putney*, supra. The court characterizes the conduct involved as "doing strictly a lawful act." We find the court's language on page 91 of its opinion interesting, and direct your attention to it as follows:

> ". . . The very purpose of the school yard is to allow opportunity for children to play therein, and the more vigorous the exercise which they take during the brief recesses given them the better is the purpose of the school yard subserved . . . Certainly we should not wish to do anything which would seem to make it necessary for children to stand about the school yard with folded hands at recess for fear they might negligently brush against one of their fellows and become liable for heavy damages . . .
>
> "So it seems entirely certain that when the accident in question occurred the defendant was engaged in a perfectly lawful and even laudable act . . . "

The court goes on further to make a distinction here which appears to be especially important. The language is as follows:

> "Infants may be guilty of actionable negligence, and even though the defendant was engaged in a perfectly lawful occupation he may have conducted himself so negligently as to make himself liable for damages resulting from such negligence. Here, however, comes in the marked difference between the tests of negligence as applied to the act of an adult and the same act when committed by a child. The rule is that a child is only required to exercise that degree of care which the great mass of children of the same age ordinarily exercise under the same circumstances, taking into account the experience, capacity, and understanding of the child . . . "

The court continues to analyze the particular conduct involved, and finds it in keeping with typical conduct on the part of children and not falling below that standard, there is no liability.

Another interesting case arises in connection with that age old and fun loving escapade known as "kicking the can". In *Hoyt v. Rosenberg* (1947, Cal.), 182 Pac. 2d 234, a verdict of $27,000 in favor of the injured plaintiff was reversed on appeal. The circumstances involved a 12 year old boy and his alleged negligence and failure

to look before he kicked a can in order to see that he was not kicking it in the direction of other children participating in the game. Apparently there was some evidence that he attempted to kick the can over a nearby fense with the toe force of a field goaler. The court held that the failure of the boy to look before he kicked did not constitute negligence that would render the boy liable. The plaintiffs did not attempt to impose liability on the mere basis of participation in the game, recognizing that some degree of danger was necessarily involved and inherent in the game. Rather, the contention was that the defendant did something while playing the game that ordinarily a boy of like age and experience would not and should not have done, or that he failed to do something a boy of his experience should have done. The court analyzed the conduct of the game and recognized that a can is often kicked in the direction of an approaching runner. With respect to the alleged failure of the defendant to look before he kicked, the court commented:

> "Not only is it unreasonable to expect a boy of that age to stop in such a moment in such a game, at the risk of losing his advantage, in order to look for something that was apparently outside of his field of action, but if he had looked and had seen her it would naturally have appeared to him, as it seemed to her, that she was in a position of safety. If it could be assumed that an ordinary boy of that age would have looked and have seen Marlene in that position, it cannot reasonably be inferred that such an ordinary boy would have realized that she was in a position of danger."

Defense counsel should also keep in mind the possibility of directed verdicts and summary judgments based upon decisions holding children of tender years incapable of negligence as a matter of law. A typical situation arose in *Shaske v. Hron*, (1954), 266 Wis. 384, 63 N.W. 2d 706, wherein the defendant child of four years and eight months, threw a stone which struck a bottle near the plaintiff child with the result that a chip of glass struck the plaintiff child in the eye. Based upon previous decisions, the court held that children under five and one half years are generally considered incapable of either contributory or primary negligence. Therefore, the supreme court reversed the trial court's refusal to grant summary judgment to the defendant.

For reference see, L.R.A. 1917F, p. 57, Restatement, 2 Torts, p. 743, Sec. 283, Comment "e."

By way of conclusion, although it is difficult to generalize, it may be safely stated that where the conduct of the child who causes injury to another is intentional, or bordering thereon, liability is an expected result for the child but not the personal liability insurance carrier. Where the children are engaged in what is essentially sport, certain bumps and bruises and other injuries are to be anticipated as part of the game or activity and, therefore, liability will not result against either the child or insurance carrier unless the conduct of the child causing the injury falls below the standard of care normally exercised by the great mass of children of similar age, intelligence and experience. However, in that case, the conduct in many cases would be bordering on and into the field of intentional torts.

A radical change in this field of law, in the attitudes of courts and juries, is not anticipated by the writer unless and until the personal comprehensive liability policy becomes as common-place in our social system as the automobile liability policy.

Problems of the Fiduciary and the Surety when the Estate Includes a Business

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WHEN an executor or administrator, guardian or trustee, has qualified with corporate surety and the assets under his control include a business, the bonding company may be expected to display more than ordinary curiosity and concern about what happens to that business. Inquiry into the legal principles which govern the fiduciary in regard to the business will reveal that such curiosity and concern are prudent, not unwarranted, and can be of benefit to the fiduciary himself. Those principles, incidentally, involve both the law of decedent's administration and the law of trusts.[1]

There is occasional outcropping of the idea that a fiduciary, simply by virtue of his office, can continue a business belonging to the estate, and that it is just that simple. Judicial decisions, however, reveal quite the opposite.

Let us take the case of a man who, at the time of his death, was engaged in carrying on a business as sole trader,[2] not as a partnership[3] or corporation.[4] His soul may go marching on, but can the business?

By the general rule of law, the death of a trader puts an end to any trade in which he was engaged at the time of his death,[5] and an executor or administrator has no authority by virtue of his office to continue it, except for the temporary purpose of converting the assets employed in the business into money.[6]

But there can be sources of authority to permit continuance[7] of the business, those sources being (1) the will of the decedent, (2) an order of the probate court, (3) the consent of all parties interested in the estate—creditors and beneficiaries. These sources, in turn, may be circumscribed with pitfalls.

In the case of a will, the courts have applied stringent rules of construction in ascertaining both the existence and extent of the authority of the executor.[8]

Regarding the *existence* of authority, the intention of a testator to confer upon an executor power to continue a business must be found in the direct, explicit, and unequivocal language of the will, or else it will not be deemed to have been conferred. Steadfast adherence to this rule produced marked difficulty for the courts under these facts: For several years before her death, a woman had conducted a clothing business through her husband as agent. By her will she gave him a life interest in all her property, and she appointed him as executor. After her death, he continued to carry on the same clothing business. Whether or not he was authorized to do so involved the following provision in the wife's will:

> "It is my wish that my husband continue the clothing business as it is now conducted so long as he continues sober and of good habits, and properly conducts the same . . ."

The case seemed to turn on the meaning of the words "my husband." If she meant by those words her husband as an individual, he had no power to conduct the business as executor; but if, on the other hand, she meant her husband as executor, then the executor was authorized to continue the clothing business. In short, was the authority to continue the business conferred upon the husband individually or as executor? In the intermediate appellate

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[1] *Bogert on Trusts*, Section 571 at p. 514. (Throughout this paper, only selected authorities will be cited.)

[2] Types of business organizations in the U. S. by number are: individual 2,668,000; partnership 691,000; corporate 412,000; according to U. S. Department of Commerce, Survey of Current Business, June, 1951, p. 11

[3] See *Burwell v. Mandeville's* Exec., 43 U. S. 560 (1844)

[4] See *Re Kohler*, 132 N. E. 114 (N. Y. 1921) but compare *Root's Estate v. Blackwood*, 94 N. E. 2d 489 (Ind. App. 1950)

[5] For a case involving legal incompetency and guardianship, see *W. I. Sistrunk & Company*, 105 S. W. 2d 1039 (Ky. 1937)

[6] *Willis v. Sharp*, 21 N. E. 705 (N. Y. 1889)—a well considered case.

[7] The various possible dispositions of a business are discussed in *Bogert on Trusts*, Section 571 at p. 513-14

[8] *Willis v. Sharp*, supra.

court three judges said—individually, and two judges said—as executor. The same acute difference occurred again on further appeal to the highest court where four judges said—individually, and three judges said—as executor. Thus, by the narrow margin of one vote in each appellate court, the will was construed not to authorize the executor to continue the business.[9] Other instances of lack of authority to continue a business include an authorization to invest, sell, and reinvest the testator's property, and oral authority to continue the business given by the decedent in his lifetime to the prospective executor or administrator.[10]

Finally, where requisite authority is conferred by the will upon an executor or trustee, it is often held to have been personal to the originally named fiduciary and not attached to the office, with the result that such authority may not pass to the execuor c.t.a. or to a successor trustee.[11]

Regarding the *extent* of authority under the will, this question often involves what assets may be employed in continuing the business. Thus, a power simply to carry on the testator's business, without anything more, will be construed as an authority simply to carry on the business with the fund already invested in it at the time of the testator's death, and to subject that fund alone, and not the general assets of the estate, to the hazards of the business.[12] An interesting case was decided by the Wisconsin Supreme Court. The testator directed his trustees to continue the business of a coal company and to hold the rest of the estate in trust, all for 10 years, when the assets of the coal business were to be distributed in one way, and the other assets in another way. Among the personal assets was a checking account in the name of the coal company and containing about $15,000 at the time of the testator's death. The bookkeeper made deposits for the coal company in this checking account, and wrote checks against the account to pay expenses of the company. Another asset was accounts receivable on the books of the coal company at the time of the testator's death, totalling around $24,000. On a petition for construction of the will of the testator, the County Court of Rock County, Judge Harry S. Fox, presiding, held that the checking account and the accounts receivable at the time of the testator's death were to be included and considered as a part of the "coal business," and not as a part of the general estate. On appeal to the Supreme Court, the trial court's decision was reversed, by a vote of 4-to-3.[13]

The second course of authority to permit continuance of the business is an order of the probate court. However, the decisions are in conflict on the question whether a court may, without statutory provision, authorize the continuance of a business.[14] Also, in the very same state, in several instances, the decisions are confusing, and in 1937 one writer included Wisconsin in that category.[15] But Wisconsin is in the category of statutory provision by virtue of Section 317.04 Wisconsin Statutes. That statute deals with liability for waste, and goes on to provide that:

> ". . . no such liability shall arise or accrue if one or more of the causes for delay mentioned in section 313.13 exists, and the administrator or executor . . . has, in good faith, for the purpose of preserving the assets of the estate, with the knowledge or approval of the court, continued the business of the decedent during the existence of such cause or causes."

I am not aware of this provision being applied by the Wisconsin Supreme Court. Mere opinion on its scope is therefore hazardous but several questions occur, namely: (1) does the statutory purpose of preserving the assets of the estate encompass continuing the business, not for the purpose of winding up but for the purpose of profit?[16] and (2) are the assets rightfully employed in the continued operations limited to the trade assets, without involving the general assets of the estate?[17]

I was intrigued by the disjunctive words of the statute, "knowledge or approval" of the court, and I wondered how far "knowledge" might extend. It was relieving to find discussion which took occasion, in a case not involving continuation of a business, to express views in an "advisory way," saying in part:

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[9] *Saperstein v. Ullman*, 63 N. Y. S. 626, aff. 61 N. E. 553 (N. Y. 1901)

[10] *Bogert on Trusts*, Section 574 at p. 519-20

[11] *Bogert on Trusts*, Section 574 at p. 520-1

[12] *Willis v. Sharp*, 21 N. E. 705 (N. Y. 1889)

[13] *In re: Britt's Estate*, 249 Wis. 602; 26 N. W. 2d 34, (1947)

[14] *Bogert on Trusts, Section* 574 at p. 520

[15] *Bogert on Trusts*, Section 579 at p. 532, quoting 36 Mich. Law Review 185

"It is hardly conceivable that it was the intention of the Legislature to limit the liability of an executor by reason of the fact that the judge of the court in some unofficial or informal way had obtained knowledge or had notice of certain facts. The county judge at a ball game or a farm auction is not the court. Information he receives in such an informal way is not knowledge of the court . . . The county court is a court of record, and the method of procedure is well understood. So far as we can judge from the record, what happened were informal conversations between the executrix and the judge. These were not sufficient to warrant the exercise of the jurisdiction of the court to extend the time of administration or to excuse the performmance by the executrix of clearly prescribed statutory duties."[18]

The statute limits continuance of the business during the existence of cause for delay in the final settlement of the estate. Where such cause for delay involves a business, the court has intimated that the protective effect of an order of court authorizing continuance of a business may depend upon the fullness of the facts presented by the personal representative to the court.[19]

The third source of authority mentioned to permit continuance of a business was the consent of all parties interested in the estate—creditors and beneficiaries. Such consent may be extremely difficult, or even impossible to secure. The persons interested in the estate may be numerous; they may be scattered or some distance away; their existence or residence may be unknown to the representative; they may be legally incapable of consent; or some may not consent. Futhermore, a representative relying on consent must show that the consent was procured or given upon full and fair representation and information communicated by him as to all the facts and circumstances connected with the risk. In the case of Onstad's Estate,[20] the executor was unable to make such showing, as against a creditor existing at the time of death of the testator. Therefore, while consent as a source of authority is potential, it may not be adequate.

In continuing the business, the personal representative will, of course, contract debts. What is his liability with respect to those debts? It is settled doctrine of the courts of law that a debt contracted by a personal representative after the death of the testator, although contracted by him as representative, binds him individually, and does not bind the estate which he represents. This is true nothwithstanding the debt may have been contracted for the benefit of the estate.[21] It is also true even though the representative is continuing the business under an order of court.[22] This personal liability attaches to any contract which the representative makes. It is not limited to representatives who act without authority, and therefore the existence of authority to continue the business is irrelevant to the personal liability of the representative.[23] The reasons[24] for this stringent attitude of the courts are: the representative is the only legal entity who promised to perform the contract; the estate is not a legal entity nor is the estate's property; the beneficiary was not a party to the contract, and the representative is not an agent for him. In short, the representative is himself a principal and the only person whom the court of law recognizes as an obligor on the contract.

With respect to this personal liability of the representative, he may or may not have a recourse right, depending upon whether he continued the business with or without authority. If with authority, he is entitled to indemnity out of the assets of the estate, either by way of exoneration, that is, by using such assets in discharging the liability so that he will not be compelled to use his individual property in discharging it, or by way of reimbursement, that is, if he has used his individual property in discharging the liability, by repaying himself out of assets of the estate. However, the extent of the representative's indemnity may be limited in several respects, such as (1) if authority to continue the business permits a part only of the estate assets to be embarked in the business, then his indemnity can reach only that part of the assets

[18] See *Bogert on Trusts*, Sections 571 and 574
[19] See 35 *Virginia Law Review* at pp. 362-3; *Johnston v. Long*, 181 P. 2d 645 (Cal. 1947); but compare *Hake v. Dilworth*, 96 S. W. 2d 121 (Tex. App. 1936)
[20] *In re: Robinson's Will*, 218 Wis. 596; 261 N. W. 725 (1935)
[20] *Re Onstad's Estate*, 224 Wis. 332; 271 N. W. 652 (1937)
[21] *Willis v. Sharp*, 21 N. E. 705 (N. Y. 1889)
[22] *Anglo-American Direct Tea Trading Company v. Seward*, 2 N. E. 2d 448 (Mass. 1936)
[23] 35 Virginia Law Review at 363 (1949)
[24] *Bogert on Trusts*, Section 712 at p. 463-4

and not the general assets of the estate; (2) if he has incurred a liability for a breach of trust committed by him, the amount of this liability is set off against the amount which he would otherwise be entitled to as indemnity.[35] If, instead of continuing the business with authority, the opposite should be the case, the usual predicament of the representative may be stated in very few words—he has no right of indemnity against assets of the estate.[36]

It may be added that the existence and extent of the representative's right of indemnity also determine the right of new business creditors against assets of the estate, since their only recourse against such assets is through the representative's right of indemnity. In short, they stand in his shoes in this respect.[37]

If losses have been incurred and the representative has continued the business without authority, he must make them good from his own pocket. Some authorities do not even allow him credit for any profit which he may make.[38]

Again, where losses have been incurred, but the representative has continued the business with authority, he will be liable for such losses if they were incurred through his fault, negligence or imprudence. This is the doctrine of the case of Onstad's Estate.[39] There, a testator, by the terms of his will, authorized his wife, whom he also named as executrix, to use her discretion as to continuing to conduct his general store business in Cambridge, Wisconsin, for the benefit of the estate. She operated the store for nearly 3 years. However, she knew that the business was being conducted at a loss and that there was a decided decrease in business after the testator's death. Prior to his death, the business was only paying expenses. She assumed she had the right to continue the business under the terms of the will, regardless of the rights of creditors. No proper accounting records were kept. The court concluded that the executrix had been imprudent in continuing the business and was therefore liable for the resulting losses. This case indicates a lack of perhaps the most essential element for successful administration of an estate when a business is included among the assets. If loss is to be avoided, the business ability and judgment of the representative who continues a business is a factor which must be given careful consideration in every case no matter how full and complete the authority conferred on him may be.

It is clear from the foregoing considerations that there is need for great care and caution on the part of the fiduciary and his surety when the estate involves a business. Pitfalls are open at all stages. In performing its function, the corporate surety must keep informed of changing laws and judicial interpretation, and see to it that its bonded principals conform to legal requirements—by no means limited to honest conduct—in the administration of estates. This is one of the many services corporate suretyship renders which is not reflected in the amount of losses paid.

To approach the close on a somewhat lighter note, we need not concern ourselves with profits from a business which is illegal. A Chinese had maintained an establishment in Boston, supposedly for the sale of tea and rice. But this was a mere cover for his real business, which was the practice of medicine according to Chinese methods, the medicine dispensed being herbs. This practice of medicine was in violation of law, for the Chinese had no certificate of authority from the state. His clientele was extensive, and with their assistance he had attempted to obtain legislation to legalize his business, but without success. On account of difficulty with the authorities, he arranged with a registered physician to come to his place of business on two days each week to examine new patients. The doctor would make a diagnosis of these patients and turn them over to the intestate and after his death to his administrator, who would prescribe for them according to Chinese methods. The business was very successful and when the Chinese died, leaving an estate of over $200,000 in cash, one of his employees qualified as administrator and carried on the business. It was alleged that the business as carried on by the administrator on his own account, was very lucrative, netting him not less than $50,000. The decedent's wife and son appeared on the scene as the only heirs. They had resided in China and never before had been to America. Suit resulted when the profits from the administrator's enterprise were claimed as part of

[35] *Restatement, Trusts,* Section 244 under Comments b and e; Section 268 under Comment h

[36] *Bogert on Trusts,* Section 577, but compare Restatement, Trusts, Section 268 under Comment e

[37] *Bogert on Trusts,* Section 575 at p. 522

[38] 33 C. J. S. Section 193, p. 1172, but compare *Bogert on Trusts,* Section 577 at p. 527.

[39] 224 Wis. 332, 271 N. W. 652 (1937)

the estate. The highest court in Massachusetts affirmed judgment for the administrator on the ground that the herb business, both as to the decedent and the administrator, was the practice of medicine in violation of law. Therefore, the court refused its aid in securing the fruits of an illegal business.[10]

Since a representative who continues a business which is illegal, and makes profits, is free to pocket the profits, this may possibly be an exception, but certainly the only exception, to my statement at the outset that the bonding company, aware as it is of pitfalls, may be expected to display more than ordinary curiosity and concern about what happens to a business.

I don't know whether testator Herman Oberweiss had a business in his estate, but his apprehensions and precautions would be fully applicable to a business. I read you several excerpts from his will, offered for probate at the June, 1934, term of the County Court of Anderson County, Texas:

> "I am writing of my will mineself that des lawyir want he should have to much money he ask to many answers about the family. First think i dont want my brother Oscar to get a god dam thing.
>
> "Tell mama that six hundret dollars she has been looking for ten years is berried from the bakhouse behind about 10 feet down. She better let little Frederick do the digging and count it when he comes up.
>
> "Mama should the rest get, but i want it so that Adolph should tell her what not she should do so no more slick irishers sell her vaken cleaner they noise like hell and a broom don't cost so much.
>
> "I want it that mine brother Adolph be my executor and i want it that the Judge should please make Adolph plenty bond put up and watch him like hell. Adolph is a good bisness man but only a dumpph would trust him with a busted pfennig."

Doubtless you subscribe to the psychology, as Herman expressed it:

> "Make plenty bond put up—watch him like hell."

To this could be added—that the courts, as protectors of the beneficiaries and creditors, enjoy the assurance of having the "watching" assisted by corporate surety. And in thinking of corporate surety as assisting the "watching," may I suggest a word that may be more descriptive of the function of suretyship—that word being "sponsorship," with all the interest and responsibility the term implies when one is sponsoring another.

[10] *Gouy Shong v. Chew Shee*, 150 N. E. 225 (Mass. 1926)

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